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1

Motion.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

No..... ORIGINAL.

IN THE MATTER
of
The Petition of JAMES C. DAVIS, Director General of Railroads, as Agent, for a Writ of Prohibition and/or Mandamus,
against
The Honorable LEARNED HAND, a Judge of the District Court of the United States for the Southern District of New York, and the other Judges and Officers of said court.

2

3

Motion for leave to file a petition for a writ of prohibition and/or a writ of mandamus.

And now comes the petitioner, James C. Davis, Director General of Railroads, as Agent, by his proctors, and moves:

4 *Motion.*

1. For leave to file petition for a Writ of Prohibition and/or a Writ of Mandamus, hereto annexed, and

2. That a rule be entered and issued directing the District Court of the United States for the Southern District of New York and the Honorable Learned Hand, a judge thereof, and the other judges and officers of said Court, to show cause why a Writ of Prohibition and/or a Writ of Mandamus should not issue against them
5 and each of them, in accordance with the prayer of said petition, and why said petitioner should not have such other and further relief therein as may be just.

T. CATESBY JONES,
JAMES W. RYAN,
Proctors for Petitioner.

6

7

Petition.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

No..... ORIGINAL.

IN THE MATTER
of
The Petition of JAMES C. DAVIS, Director General of Railroads, as Agent, for a Writ of Prohibition and/or Mandamus,
against
The Honorable LEARNED HAND, a Judge of the District Court of the United States for the Southern District of New York, and the other Judges and Officers of said court.

8

9

Petition for a writ of prohibition and/or writ of mandamus.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

10 *Petition.*

The petition of James C. Davis, Director General of Railroads, as Agent, appointed pursuant to the provisions of Section 206 of the Transportation Act of 1920, against the Honorable Learned Hand, a judge of the District Court of the United States for the Southern District of New York, sitting in Admiralty, and against all of the other judges and officers of said court, respectfully represents:

11 FIRST: That on February 19th, 1920, the New Jersey Shipbuilding & Dredging Company, owner of a certain Drill Scow designated as No. 3, filed a libel in the District Court of the United States for the Southern District of New York, in admiralty, against the steamtug "Mahanoy", her engines, etc., to recover damages in the sum of about Sixty Thousand ($60,000.00) Dollars, resulting from a collision on or about November 7th, 1919, between said Drill Scow "No. 3", which was moored in about the middle of the East River, New York Harbor, engaged in ex-
12 cavating the bed of said river at that place, and the steamtug "Mahanoy" and her tow of 18 loaded coal boats. It prayed that process, according to the course and practice in causes of admiralty and maritime jurisdiction, issue against the said steamtug "Mahanoy", and that the Court decree to libellant payment of its damages, together with interest and costs, and that the said steamtug be condemned and sold to satisfy same. A copy of the libel, as part of the record of the proceedings in said District Court, is hereto annexed.

SECOND: That thereafter and on May 25th, 1920, a consent order was made and entered amending said libel by

"substituting in the title, the first paragraph and the prayer therein, Walker D. Hines, as Director General of Railroads, as Agent, for and in the place of the steamtug 'Mahanoy', her engines, etc., with the same force and effect as if the said Director General of Railroads had been originally made party respondent in said suit, and that said libel be further amended by inserting the following additional article:

'NINTH: Upon information and belief, the Lehigh Valley Railroad Company and its steamtug 'Mahanoy' at the time in the libel mentioned, was in the possession, use and operation of the President and the United States Railroad Administration acting through the said respondent Walker D. Hines, as Director General of Railroads.

'Pursuant to the provisions of Section 206 of the "Transportation Act, 1920" the respondent Walker D. Hines, as Director General of Railroads, was duly designated by the President of the United States the agent against whom shall be brought proceedings in admiralty, based on causes of action arising out of the possession, use or operation by the said

16 *Petition.*

President, of the railroads and systems of transportation of any carrier under the provisions of the Federal Control Act or the Act of August 29, 1916.

'Libellant's cause of action arises out of the possession, use or operation of the Lehigh Valley Railroad and its steamtug 'Mahanoy' as aforesaid, by the President acting through the Director General of Railroads, and this suit is brought
17 against the latter in conformity with the provisions of said "Transportation Act".'

JOHN C. KNOX,
U. S. .D J."

A copy of said order, as part of the record of proceedings in said District Court, is hereto annexed.

THIRD: That thereafter and on July 1st, 1920, the respondent (the petitioner herein), by Har-
18 rington, Bigham & Englar, his proctors, filed an answer to said libel and also a petition under the 59th (now 56th) Rule in Admiralty, impleading John Barton Payne, Director General of Railroads, as agent for the New York, New Haven & Hartford Railroad Company, owner of the steamtug "Transfer No. 20". Said petition alleged that the aforesaid collision and consequent damage were not caused or contributed to by any fault or neglect on the part of the said

steamtug "Mahanoy" or those in charge of her, but were wholly and solely due to the fault and neglect of the steamtug "Transfer No. 20" and those in charge of her in the particulars therein pointed out and prayed that John Barton Payne, Director General of Railroads, as agent for the New York, New Haven and Hartford Railroad Company, owner of the steamtug "Transfer No. 20" be cited to appear and answer the matters in the libel and petition and that if any damages should be decreed the libellant that the decree might be entered against the said John Barton Payne, Director General of Railroads as agent for the said New York, New Haven & Hartford Railroad Company. Copies of said answer and petition, as part of the proceedings in said District Court, are hereto annexed.

FOURTH: That thereafter and on July 7, 1920, John Barton Payne, Director General of Railroads, as Agent for the New York, New Haven & Hartford Railroad Company, impleaded, appeared in said action by Charles M. Sheafe, Jr., his proctor, and on October 13th, 1920, filed a bill of exceptions to said impleading petition on the ground that:

"Any decree for damages to which the original libellant herein may be entitled will necessarily be satisfied pursuant to law out of a common fund belonging to the United States and either derived from the

operation of said railroads, including the transportation system of the Lehigh Valley Transportation Company, the Lehigh Valley Railroad Company, or out of the revolving fund or funds appropriated by the aforesaid Acts."

and that thereafter and on January 11th, 1922, after argument of said exceptions, they were sustained and the libel and impleading petitions were dismissed without costs, and an order to
23 this effect was made and entered. Copies of said notice of appearance, exceptions and order, as part of the record of proceedings in said District Court, are hereto annexed.

FIFTH: Annexed hereto, marked Exhibit A is a history of the legislation and executive orders relating to the Federal control of railroads during the period from December 28th, 1917, to March 1st, 1921.

SIXTH: That on January 11th and 12th, 1922,
24 said action, together with two other similar actions arising out of the same collision and also brought against Walker D. Hines, Director General of Railroads, without the issuance or service of process, proceeded to trial and were tried before Honorable Learned Hand, one of the judges of said court, and that at the trial it was urged by the respondent (the petitioner herein) that the Court could not exercise jurisdiction over the respondent, Walker D. Hines, Director General of Railroads, as agent, since

process had not been issued and served in accordance with the provisions of said Section 206, subdivision (b) thereof, said Act, and that the Court was without jurisdiction to proceed against said Walker D. Hines or to hear and determine the matters alleged in said libel. The Court, however, ruled that the respondent having appeared voluntarily by his proctors and filed a notice of appearance, could not then be heard to say that the Court had not acquired jurisdiction, assumed jurisdiction, and awarded an interlocutory decree and order of reference to compute damages to the libellant, without finding the Director General as operating The Lehigh Valley Railroad negligent, and on February 18th, 1922, an interlocutory decree and order of reference to compute damages, and amending the libel by substituting James C. Davis as respondent in the place and stead of Walker D. Hines, was made and entered. A copy of the minutes of the trial showing the ruling of the Court, and of said interlocutory decree, as part of the record of proceedings in said District Court, are hereto annexed.

SEVENTH: That a certified copy of the record of proceedings in said District Court of the United States for the Southern District of New York, filed in the said cause, is hereto annexed and made a part hereof.

EIGHTH: That, although the respondent offered to give testimony tending to prove that

the injury, of which the libellant complained, was sustained as a result of the negligence of the servants, agents and employees of the Director General of Railroads, as operating the New York, New Haven & Hartford Railroad Company, the District Court refused to permit the same to be made. The District Court ruled that the injury was admittedly due to the negligence of the servants of the Director General of Railroads, and therefore, it was immaterial in so far as the liability of the Director General was concerned, whether these servants were employed in the operation of the Lehigh Valley Railroad Company or of the New York, New Haven & Hartford Railroad Company. (See extract of Minutes and rulings of Court on page here-of.

NINTH: That, by virtue of the Transportation Act of 1920, section 206, the United States of America cannot be sued through the Director General of Railroads, except in accordance with the permission granted by the said Act of Congress; and that, by the terms of that Act, no suit can be brought unless process has been served upon an agent or officer of the Transportation Company, whose property the Director General was operating and only in respect of the acts or want of care of the servants and agents of the Director General as operator of such property.

31

TENTH: By the terms of the Act of Congress of March 21st, 1918, carriers, while under Federal control, are made subject to all laws and liabilities as common carriers, and it was further provided that:

"Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto, upon the ground that the 32
carrier is an instrumentality or agency of the Federal Government."

ELEVENTH: This suit was instituted on February 19th, 1920, against the tug "Mahanoy", then operated by the Federal Railroad Administration, but the said tug was not arrested by the marshal of the court, nor was claim filed to said tug by the Director General. On February 28th, 1920, the act, known as the Transportation Act of 1920, was approved by the President. By the terms of that act 33

"Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control

34 *Petition.*

could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose."

Thereafter the libel was amended by Court order as set forth in paragraph "Second" hereof.

TWELFTH: It is respectfully submitted that the District Court exceeded its jurisdiction when
35 it held that in this action the Director General of Railroads was in court for all purposes, and that the Director General of Railroads could be made to respond for faults of any of his servants, agents and employees, although these servants, agents and employees were not employed by the carrier against which the suit lay, but were employed to operate an entirely separate and distinct system of transportation belonging to another carrier, to wit, the New York, New Haven & Hartford Railroad. It
36 respectfully submits that such a holding permits the maintenance of a suit against the said Director General which is not in accordance with the terms of the Act of March 21st, 1918, known as the Federal Control Act, and the Act of February 28th, 1920, known as the Transportation Act, and that no suit can be maintained against the said Director General except in accordance with the terms of said Acts of Congress.

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THIRTEENTH: That, if the suit, because of the amendment of the libel, be construed to be a suit brought pursuant to the Act of February 28th, 1920, known as the Transportation Act, the said suit was improperly brought because no process was served on any officer or agent of the Lehigh Valley Railroad Company or the Lehigh Valley Transportation Company as required by sub-section B, Section 206 of the Act of February 28th, 1920, known as the Transportation Act.

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FOURTEENTH: That the said District Court erred in holding that the Director General of Railroads, having appeared in the said suit, was estopped from objecting to the Court's jurisdiction in respect of amendment made to the said original libel, where no process was served pursuant to the terms of the Act of February 28th, 1920, known as the Transportation Act.

39

WHEREFORE, your petitioner, the aid of this Honorable Court respectfully requesting, prays:

1. That a Writ of Prohibition be issued out of this Honorable Court to the said Honorable Learned Hand, Judge of the United States District Court for the Southern District of New York, and/or the other judges and officers of said court, prohibiting him and them from taking any further steps whatsoever in the cause aforesaid, and, generally, from the further

exercise of jurisdiction in said cause, or the enforcing of any order, judgment or decree made under color thereof.

2. That, in the alternative, a Writ of Prohibition be issued by this Honorable Court to the said Honorable Learned Hand, a Judge of the United States District Court for the Southern District of New York and/or the other judges and officers of said court, prohibiting him or them from taking any further steps whatsoever in the cause aforesaid, in so far as the loss complained of may have been caused by the negligence of the servants, agents and employees of the Director General of Railroads as the operator of the New York, New Haven & Hartford Railroad Company, and in so far as the said Court, and/or any of the judges thereof may hold or attempt to hold the said Director General of Railroads, as operator of the Lehigh Valley Railroad Company, and/or the Lehigh Valley Transportation Company, responsible for the negligence of the servants, agents and employees of the said Director General of Railroads, as operator of the New York, New Haven & Hartford Railroad.

3. That a Writ of Mandamus be issued out of and from this Honorable Court, directing and commanding the Honorable Learned Hand, a Judge of the District Court of the United States for the Southern District of New York, to vacate the interlocutory decree and order of reference so made and entered by him, as prayed

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for in the libel filed in said cause, and either to enter a final decree, dismissing the libel filed by the New Jersey Shipbuilding & Dredging Company against the said Director General, with costs to the respondent, or to direct that further proceedings be had as directed by this Court.

4. That the Court grant to the petitioner such other and further relief as may be just in the premises.

44

T. CATESBY JONES,
JAMES W. RYAN,
Proctors for Petitioner,
Office & P. O. Address,
No. 64 Wall Street,
Borough of Manhattan,
New York City.

State of New York, }
County of New York, } ss.:

45

I have read the foregoing petition by me subscribed, and the facts therein stated are true to the best of my information and belief.

T. CATESBY JONES.

Subscribed and sworn to before me this
3rd day of March, 1923.

EDWARD A. QUINLAN,
Notary Public.
(Seal)

46

Docket Entries in District Court

TRANSCRIPT OF RECORD
OF PROCEEDINGS IN DISTRICT COURT.

NEW JERSEY SHIPPING AND DREDGING COMPANY,

vs.

47 STEAMTUG "MAHANOY".

Feb. 19, 1920—Filed libel and stipulation for costs.
May 24, 1920— " order amending libel.
July 1, 1920— " answer and waiver of security for costs.
" 1, 1920— " petition.
" 7, 1920— " notice of appearance.
Aug. 31, 1920— " notice of trial and note of issue.
48 Oct. 13, 1920— " note of issue (motion to dismiss).
Jan. 11, 1922—L. Hand, J.—Case tried with 71-343 and 72-155, Libellants witness 5 ex 2.
" 12, 1922—Libellants witness 1.
Decrees for libellants in these cases.
" 11, 1922—Filed order sustaining exceptions and dismissing libel and petition as to D98RR—N. Y., N. H. & H.

Docket Entries in District Court (annexed). 49

Jan. 11,1922—Files affidavit and issued writ of habeas corpus and test.

Feb. 27, 1922—Filed interlocutory decree and reference to E. C. Rouse.

" 27, 1922—Issued citation returnable 3/10/-22.

Mar. 3, 1922—Filed citation—respondent record.

" 7, 1922—Filed notice of appearance.

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Exhibit A.

BRIEF HISTORY OF LEGISLATION AND EXECUTIVE ORDERS RELATING TO FEDERAL CONTROL OF RAILROADS.

On December 28th, 1917, pursuant to the powers conferred on him by the Act of the 29th of August, 1916 (39 Stat. 645), the President took possession and assumed control of every system of railroad transportation and
53 appurtenances thereof, located within the boundaries of the continental United States. By his proclamation issued on that day he appointed William G. McAdoo Director General of Railroads and the railroads passed into the possession, use, control and operation of such Director General, from and after 12 o'clock midnight on December 31st, 1917. The proclamation among other things provided that the Director General might perform the duties imposed upon him, so long and to such extent as he should determine, through the officers and
54 employees of the said systems of transportation. Until the Director General otherwise directed the officers and employees of the various systems were to continue the operation thereof in the usual and ordinary course of the business of common carriers in the names of their respective companies. The proclamation further provided as follows:

> "Except with the prior written assent of said Director, no attachment by mesne pro-

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cess or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said Director may, by general or special orders, otherwise determine" (40 St. Pt. 2, p. 1733).

Thereafter Congress passed the Act of March 21, 1918 (40 St., P. 451, c. 25), which further 56
regulated the subject of Federal control. Among other provisions was the following:

"Carriers while under Federal control shall be subject to all laws and liabilities as common carriers whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and 57
against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto, upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action

58 *Exhibit A.*

was not so transferable prior to the Federal control of such carriers; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall, upon motion of either party, be re-transferred to the Court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control."

59

On October 28th, 1918, the Director General promulgated General Order No. 50. It reads:

"Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control for which the said carrier corporations are not responsible, and it is right and proper

60 that the actions, suits and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control should be brought directly against the said Director General of Railroads and not against said corporations:

It is therefore ordered, that actions at law, suits in equity, and proceeding in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads, claim for death or injury to

Exhibit A.

61

person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures."

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William G. McAdoo having resigned as Director General, the President, on January 10, 1919, pursuant to the powers which had been conferred upon him by law affecting Federal control of railroads and systems of transportation, appointed Walker D. Hines as Director General and authorized him among other things "to issue any and all orders which may in any way be found necessary and expedient in connection with Federal control of such systems of transportation, railroads or inland waterways, as fully in all respects as the President is authorized to do, and generally to do and perform all and singular all acts and things and to exercise all and singular the powers and duties in relation to such Federal control as the President is by law empowered to do and perform" (40 St. 1922).

63

64 *Exhibit A.*

On January 11, 1919, Walker D. Hines as Director General of Railroads, issued General Order No. 50-A, which corresponded in all respects with General order No. 50, except that suits were no longer to be brought against William G. McAdoo but simply against the Director General of Railroads.

The act of February 28, 1920, known as "The Transportation Act, 1920," provided that Federal control should terminate on March 1, 1920, and provision was made as to the prosecution of
65 suits as follows:

CAUSES OF ACTION ARISING OUT OF FEDERAL CONTROL.

Sec. 206. (a) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the pro-
66 visions of the Federal Control Act, or of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now

Exhibit A.

prescribed by State or Federal statutes but not later than two years from the date of the passage of this act, be brought in any court which but for Federal control would have had jurisdiction of the cause of action had it arisen against such carrier. 67

(b) Process may be served upon any agent or officer of the carrier operating such railroad or system of transportation, if such agent or officer is authorized by law to be served with process in proceedings brough against such carrier and if a contract has been made with such carrier by or through the President for the conduct of litigation arising out of operation during Federal control. If no such contract has been made process may be served upon such agents or officers as may be designated by or through the President. The agent designated by the President sub-division (a) shall cause to be filed, upon the termination of Federal control, in the office of the Clerk of each District Court of the United States, a statement naming all carriers with whom he has contracted for the conduct of litigation arising out of operation during Federal control, and a like statement designating the agents or officers upon whom process may be served in actions, suits, and proceedings arising in respect to railroads or systems of transportation with the owner of which no such contract has been made; and such statements shall 68 69

70 *Exhibit A.*

be supplemented from time to time, if additional contracts are made or other agents or officers appointed.

(c) Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal control of rates, fares, charges, classifications, regulations, or practices (including those applicable to
71 interstate, foreign or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory, or unduly or unreasonably prejudicial, or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission within one year after the termination of Federal control, against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against which such complaint would have been brought if such railroad
72 or system had not been under Federal contol at the time the matter complained of took place. The Commission is hereby given jurisdiction to hear and decide such complaints in the manner provided in the Interstate Commerce Act, and all notices and orders in such proceedings shall be served upon the agent designated by the President under subdivision (a).

(d) Actions, suits, proceedings, and reparation claims, of the character above

described at the termination of Federal control shall not abate by reason of such termination, but may be prosecuted to final judgment, substituting the agent designated by the President under subdivision (a). 73

(e) Final judgments, decrees, and awards in actions, suits, proceedings, or reparation claims, of the character above described, rendered against the agent designated by the President under subdivision (a), shall be promptly paid out of the revolving fund created by section 210. 74

(f) The period of Federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control.

(g) No execution or process, other than on a judgment recovered by the United States against a carrier, shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control. 75

76

Libel.

To the Honorable, the Judges of the District Court of the United States for the Southern District of New York:

The libel and complaint of the *New Jersey Shipbuilding & Dredging Company* against the Steamtug "*Mahanoy*", her engines, etc., in a cause of damage, civil and maritime, by collision, respectfully
77 shows to the Court:—

First: The steamtug *Mahanoy* as libellant is informed and believes, is now in this District and within the jurisdiction of this Court.

Second: The New Jersey Shipbuilding & Dredging Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal place of business at Bayonne, in said State, is and at the time hereinafter mentioned was engaged in the dredging business, including the removal of
78 reefs and rocks from the beds of navigable waters, and in connection with its said business was the owner of a certain Drill Scow designated as No. 3.

Third: On or about the 2nd day of September, 1919, the said libellant entered into a contract with the United States of America, through its properly constituted officers, to excavate the bed of the East River to a depth of forty feet

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below mean low water, over a certain specified area. The purpose of the contract was to remove an obstruction or reef in the river so as to permit the safe passage of deep draft vessels through the waterway.

FOURTH: The method of performance of said contract by the libellant was as follows:—With its said Drill Scow it drilled holes into the rock which composed the bed of the waterway. The rock was then disrupted by blasting and excavated and removed by a dredge. In order to operate said Drill Scow, it was necessary to hold 80
her rigid and by reason of the strength of the tidal flow in order to so hold her, she was anchored with spuds and also with four anchors, extending one from each corner.

The Drill was placed in position by the agents, employees and servants of the United States, and was at all times and at the time hereinafter mentioned, located and operated under their orders, direction and supervision. The area to be excavated under said contract, was known and designated as the Clark Street area, and was located in the river about abreast of Old 81
Slip, in the Borough of Manhattan, City of New York.

FIFTH: Upon information and belief, on or about the 7th day of November, 1919, in the due performance of the work of removing said reef, the libellant had its said Drill Scow No. 3 anchored over said reef as aforesaid, headed to the eastward about 600 feet off the Manhattan pier

82 *Libel.*

head line. In the position which she then occupied, there was room for vessels bound through the river to pass her on either side.

At about 5 P. M. on said day, while said Drill Scow was lying anchored and motionless, operating under said contract, the steamtug *Mahanoy,* with a heavy tow of loaded coal barges, arranged in tiers, on a long hawser, came out of the North River into the East River, bound upstream close to the piers on the Manhattan shore. The tide at the time was running flood; wind light; weather clear and Drill Scow
83 No. 3 had her lights properly set, brightly burning, and her crew on deck attending to their respective duties.

The *Mahanoy* shaped her course so as to pass up between No. 3 and the piers on the Manhattan side of the river, and in so doing was so carelessly and negligently handled and navigated, that she brought the middle tier of her tow into contact with the port after corner of No. 3, and thereafter under its momentum and the force of the tide, the tow swung around the Drill Scow.

84 The force of the contact was so severe that it broke and carried away the drills, drill columns, appliances and equipment; damaged her machinery and caused her other serious injuries.

SIXTH: Upon information and belief, said collision and damages were not caused or contributed to by any fault or act of negligence on the part of Drill Scow No. 3, but were solely caused by the fault and negligence of the steamtug *Ma-*

hanoy and among others in the following particulars:— 85

1. In that she did not have a competent master in charge carefully attending to duty.

2. In that she failed to maintain a proper lookout.

3. In that she did not observe the Drill Scow in time and take timely precautions to pass her in safety.

86

4. In that she did not pass up through the middle of the East River, as was her duty.

5. In that she attempted the dangerous manoeuvre of passing between the Drill Scow and the New York docks, when there was no necessity for her so doing.

6. In that she attempted to take a tow through the East River, which was too heavy and cumbersome for her to handle in safety.

87

7. In that she attempted to pass too close to the anchored Drill Scow at a place where there was abundance of sea room and no occasion for her so doing.

8. In that she misjudged the force and set of the tide.

88 *Libel.*

9. In that she brought her tow into contact with the Drill Scow which was at anchor and motionless.

And in other faults and acts of negligence which libellant will prove on the trial of this cause.

SEVENTH: Upon information and belief, by reason of said collision, libellant has sustained damages in the cost of repairs; cost of wrecker's services; cost of towage, cost of survey and in
89 the loss of the use of said Drill Scow during the time necessarily consumed in making said repairs in the sum of Sixty thousand ($60,000) Dollars as nearly as at present can be ascertained, payment of which has been demanded and refused.

EIGHTH: All and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE, libellant prays that process in due form of law, according to the course and prac-
90 tice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the steamtug *"Mahanoy"*, her engines, etc.; that all persons having any right, title or interest in her may be cited to appear and answer upon oath all and singular the premises aforesaid; that this Court may be pleased to decree payment to libellant of the amount of its claim aforesaid, together with interest and costs; that said steamtug, her engines, etc. may be con-

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demned and sold to pay the same; and that libellant may have such other and further relief in the premises as may be just.

ALEXANDER & ASH,
Proctors for Libellant.

Southern District of New York, ss.:

92

CHARLES D. PULLEN, being duly sworn, deposes and says: That he is Vice-President of the New Jersey Shipbuilding & Dredging Company, libellant herein; that he has read the foregoing libel and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

The reason this verification is not made by libellant in person is that it is a corporation and deponent is an officer thereof, to wit, its Vice-President as aforesaid.

93

CHAS. D. PULLEN.

Sworn to before me, this
18th day of February, 1920.

HENRIETTA LOWENTHAL,
Notary Public, N. Y. Co. #330.

(Seal)

94 **Order Amending Libel.**

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the U. S. Court and Post Office Building, in the Borough of Manhatan, City of New York, on the 25th day of May, 1920.

Present:

Hon. JOHN C. KNOX,
District Judge.

95

NEW JERSEY SHIPBUILDING & DREDGING CO.,
Libellant,

against

Steamtug "MAHANOY", her engines, etc.,

On reading and filing the annexed consent and on motion of Alexander & Ash, proctors for Libellant, it is

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ORDERED, that the libel herein be amended by substituting in the title, the first paragraph and the prayer herein, Walker D. Hines, as Director General of Railroads, and agent, for and in the place of the steamtug "*Mahanoy*", her engines, etc. with the same force and effect as if the said Director General of Railroads had been originally made party respondent in said suit, and that said libel be further amended by inserting the following additional article:

"NINTH: Upon information and belief, The Lehigh Valley Railroad Company and its Steamtug "*Mahanoy*" at the time in the libel mentioned, was in the possession, use and operation of the President and the United States Railroad Administration acting through the said respondent, Walker D. Hines, as Director General of Railroads.

Pursuant to the provisions of Section 206 of the 'Transportation Act, 1920' the respondent Walker D. Hines, as Director General of Railroads, was duly designated by the President of the United States the agent against whom shall be brought proceedings in admiralty, based on causes of action arising out of the possession, use or operation by the said President, of the railroads and systems of transportation of any carrier under the provisions of the Federal Control Act or the Act of August 29, 1916.

Libellant's cause of action arises out of the possession, use or operation of the Lehigh Valley Railroad and its Steamtug "*Mahanoy*" as aforesaid, by the President acting through the Director General of Railroads, and this suit is brought against the latter in conformity with the previsions of said 'Transportation Act'."

JOHN C. KNOX,
U. S. D. J.

Consented to:
HARRINGTON, BIGHAM & ENGLAR,
Proctors for Respondent.

100

Answer.

To the Honorable, the Judges of the United States District Court for the Southern District of New York.

The answer of *John Barton Payne*, successor to *Walker D. Hines*, Director General of Railroads, as agent for the *Lehigh Valley Transportation Company*, to the amended libel and complaint of
101 the *New Jersey Shipbuilding & Dredging Company*,

against

Walker D. Hines, as Director General of Railroads and Agent, in a cause of collision, civil and maritime, alleges, on information and belief, and respectfully shows to this Honorable Court as follows:

First: He admits the allegations contained
102 in the first article of said libel.

Second: He denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the second article of said libel.

Third: He denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the third article of said libel.

Answer.

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FOURTH: He denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the fourth article of said libel.

FIFTH: He denies each and every allegation contained in the fifth article of said libel excepting insofar as the same is hereinafter admitted or modified in the ninth article of this answer.

SIXTH: He denies each and every allegation contained in the sixth article of said libel.

104

SEVENTH: He denies that he has any knowledge or information sufficient to form a belief as to any of the allegations contained in the seventh article of said libel.

EIGHTH: He admits the allegations in the first and second paragraphs of the ninth article of said libel as amended, except that he denies that the steamtug "*Mahanoy*" was owned by the Lehigh Valley Railroad Company as therein alleged and except that he denies that said steamtug "*Mahanoy*" was owned by the Lehigh Valley Railroad Company as alleged in the third 105
paragraph of said ninth article of said libel, and admits the allegations in said third paragraph of said ninth article of said libel that suit is brought in conformity with the previsions of the Transportation Act.

NINTH: He admits the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court and denies each and every

106 *Answer.*

other allegation contained in the eighth article of said libel.

TENTH: On the 7th day of November, 1919, the steamtug "*Mahanoy*" with seventen (17) loaded coal boats in tow, in five tiers on two hawsers of about 40 fathoms in length, was proceeding from the vicinity of the Statue of Liberty to the East River shaping her course for about the center of the East River. The tide was flood, the weather was clear and the wind was blowing strongly from the northwest.

107 As the "*Mahanoy*" approached the mouth of the East River, her captain saw the dredge "*McMartin*" anchored near the middle of the stream, but a little nearer the New York shore. He proceeded between the "*McMartin*" and Governors Island. As he neared the "*McMartin*" he saw a drill anchored in about the center of the stream between the Wall Street ferry slip and Pier 8, Brooklyn, and a bucket dredge about 500 or 600 feet off Pier 16, Brooklyn. There were also several barges tied up at the ends of piers along the Brooklyn shore. This condition rendered the channel between the drill

108 and the Brooklyn shore so narrow that, with the flood tide also setting over toward the Brooklyn shore, it was unsafe for the "*Mahanoy*" with her tow to attempt to pass on the Brooklyn side of the drill. Her master, therefore, as soon as her tow had cleared the "*McMartin*", began to haul in toward the New York shore to pass between the drill and the New York shore.

When the "*Mahanoy*" was about abreast of Piers 5 and 6 her master noticed the tug "*At-*

hens'' then about abreast of Pier 13 coming down the river along the New York shore with three floats and he steered to pass as close to her as was safe. At the same time looking back he noticed the tug *''Transfer No.* 20'' astern of his tow, coming into the East River with a car-float on each side of her and hauling in between the ''Mahanoy's'' tow and the New York shore. 109

The master of the ''Mahanoy'' seeing that it would be unsafe for the ''Transfer No. 20'' to attempt to pass her with her tow before the ''Mahanoy'' and her tow had passed clear of the drill at once sounded an alarm to hold back the ''Transfer No. 20''. The ''Transfer No. 20'' gave no heed to this signal but came on with unabated speed proceeding up along the port side of the ''Mahanoy's'' tow and at such a speed that it was apparent that she would likely get abreast of both the ''Athens'' and the ''Mahanoy'' at the same time. Seeing this situation the master of the ''Mahanoy'' again signalled an alarm to the ''Transfer No. 20'' to hold back and permit him to haul on toward the New York shore. Again the ''Transfer No. 20'' ignored the alarm of the ''Mahanoy'' but as before came on with undiminished speed and crowded in between the ''Athens'' and the ''Mahanoy'' and her tow coming so close to the ''Mahanoy'' that her starboard float rubbed against the bow fender of the ''Mahanoy''. 110 111

The insistence of the ''Transfer No. 20'' upon passing between the ''Athens'' and the ''Mahanoy'' and her tow forced the ''Mahanoy'' to slow down to one bell to let the ''Transfer No. 20'' pass as quickly as possible. This caused the

112 *Answer.*

"Mahanoy", in the tide then running, to lose control of her tow so that the flood tide caught the tow carrying it over towardl the Brooklyn shore, and, although as soon as the "Transfer No. 20" had cleared, the "Mahanoy" hauled in at once toward the New York shore, at full speed ahead in an effort to pull her tow clear of the drill, she was unable to do so and the tide brought her tow into collision with the drill, doing considerable damage to said drill and to several of the boats of the "Mahanoy's" said tow.

113

ELEVENTH: That the collision and alleged damages were not caused nor contributed to by any fault or neglect on the part of the steamtug "Mahanoy" or those in charge of her, but were wholly and solely due to the fault and neglect of the steamtug "Transfer No. 20" and those in charge of her, in the following, among other particulars, which will be pointed out at the trial of this action:

1. In that those in charge of the steamtug "Transfer No. 20" were incompetent and inattentive to their duties.

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2. In that those in charge of the steamtug "Transfer No. 20" failed to maintain a proper and vigilant lookout.

3. In that those in charge of the steamtug "Transfer No. 20" disregarded all signals of the "Mahanoy".

Answer.

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4. In that those in charge of the steam-tug "Transfer No. 20" under the conditions which must have been apparent to them, persisted in crowding between the "Athens" and the "Mahanoy" instead of giving these tugs and their tows time to pass each other and to clear the drill.

5. In that those in charge of the steam-tug "Transfer No. 20" failed to take properly into consideration the movements of the tide.

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6. In that those in charge of the steam-tug "Transfer No. 20" crowded in between the "Mahoney" and the "Athens" and their tows and forced the "Mahanoy" to slow down so that the tide could and did carry her tow upon the drill.

7. In that those in charge of the steam-tug "Transfer No. 20" did not pass up the river between the Brooklyn shore and the Drill Scow No. 3.

8. In that those in charge of the steam-tug "Transfer No. 20" failed to slacken her speed on approaching the "Mahanoy". 117

9. In that those in charge of the "Transfer No. 20" proceeded at too great a speed.

10. In that those in charge of the steam-tug "Transfer No. 20" being the overtaking boat failed to keep her out of the way of the "Mahanoy" and her tow.

118 *Answer.*

11. In that those in charge of the steam-tug "Transfer No. 20" did nothing to avoid the accident.

TWELFTH: As a further and separate defense to the said libel, respondent alleges that your respondent is entitled to limit his liability to the value of the said tug and its pending freight, if any, and respondent reserved all of his rights to set up his right to limitation by a petition for limitation of liability, filed pursuant to the Revised Statutes of the United States and the
119 Acts of Congress amendatory and supplemental thereto, if it should be advised that such a proceeding is necessary.

THIRTEENTH: All and singular the premises are true.

WHEREFORE, respondent prays that the libel herein be dismissed with costs.

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Respondent,
64 Wall Street,
120 Borough of Manhattan,
City of New York.

Answer.

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State of New York, }
County of New York, } ss.:

T. Catesby Jones, being duly sworn, deposes and says:

That he is a member of the firm of Harrington, Bigham & Englar, proctors for the respondent herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

122

That the reason this verification is made by deponent and not by respondent, is that respondent is not now within this jurisdiction.

That the sources of deponent's information and the grounds of his belief are statements made by the respondent and documents in the possession of deponent.

T. Catesby Jones.

Sworn to before me, this
29th day of June, 1920.

123

P. J. R. McEntegart,
Notary Public, New York County.
New York County Clerk's No. 120.
New York Register's No. 2102.
Certificate filed in Kings Co.
Clerk's No. 47; Register's No. 2043.
Commission expires March 30, 1922.

(Notarial Seal)

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Petition.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

125

WALKER D. HINES, as Director General of Railroads and Agent,
Respondent.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

The Libel and Petition of *John Barton Payne,* successor to Walker
126 D. Hines, Director General of Railroads, as Agent for the Lehigh Valley Transportation Company, against *John Barton Payne,* Director General of Railroads, as Agent for the *New York, New Haven & Hartford Railroad Company,* in the action of the *New Jersey Shipbuilding & Dredging Company* against

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Walker D. Hines, as Director General of Railroads, and agent, in a cause of collision, civil and maritime, alleges on information and belief, and respectfully shows to this Honorable Court as follows:

FIRST: That at and during all the times hereinafter mentioned, the Lehigh Valley Transportation Company was and still is a foreign corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, 128
having an office and place of business at 143 Liberty Street, in the Borough of Manhattan, City and County and State of New York, and engaged in the business of transportation of merchandise by water in and about the harbor of New York and is and at all the times hereinafter mentioned was the owner of and operating the steamtug "Mahanoy".

SECOND: That at and during all the times hereinafter mentioned, the New York, New Haven & Hartford Railroad Company, was and still is a foreign corporation organized and 129
existing under and by virtue of the laws of the State of Connecticut, with an office and place of business in the City of New Haven in the State of Connecticut, and also in the Borough of Manhattan, City, County and State of New York and engaged in the business of transportation for hire.

THIRD: That at and during all the times hereinafter mentioned, the said New York, New

Haven & Hartford Railroad Company was and still is the owner of the steamtug "Transfer No. 20".

FOURTH: That heretofore by certain proclamations of the President of the United States of America and certain Acts of Congress, said railroads and carriers, including the Lehigh Valley Transportation Company and the New York, New Haven & Hartford Railroad Company, were placed under the direction and control of the Director General of Railroads and a Director
131 General of Railroads was duly appointed and qualified and entered upon the discharge of his duties as such and during all the times hereinafter mentioned was in charge of the operation and control of all the property of the said Lehigh Valley Transportation Company used for transportation purposes including the steamtug "Mahanoy" and of all the property of the New York, New Haven & Hartford Railroad Company used for transportation purposes including the steamtug "Transfer No. 20". That thereafter John Barton Payne was appointed and designated Director General of Railroads
132 as agent for the said Lehigh Valley Transportation Company and New York, New Haven & Hartford Railroad Company against whom actions at law might be brought based on causes of action arising out of the operation by the President under the provision of the Federal control Act of said railroads or systems of transportation, and duly qualified and is now acting as such in this district and as such is within the jurisdiction of this Honorable Court.

Petition.

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FIFTH: That heretofore and on or about the 19th of February, 1920, a libel was filed in this Court by the New Jersey Shipbuilding & Dredging Company against the steamtug "Mahanoy", her engines, etc., praying that process may issue against the steamtug "Mahanoy", her engines, etc. and that all persons having any right, title or interest in said steamtug "Mahanoy" be cited to appear and answer the said libel and that the Court also decree to the libellant damages in the sum of Sixty thousand ($60,000.) Dollars alleged to have been sustained by the drill scow "No. 3" belonging to said libellant on or about the 7th day of November, 1919. In said libel it was alleged that said damages sustained by said drill scow "No. 3" were due to the fault and negligence on the part of the steamtug "Mahanoy" in the following respects:

134

1. In that she did not have a competent master in charge carefully attending to duty.

2. In that she failed to maintain a proper lookout.

3. In that she did not observe the drill scow in time and take timely precautions to pass her in safety.

135

4. In that she did not pass up through the middle of the East River, as was her duty.

5. In that she attempted the dangerous manoeuvre of passing between the drill

136 *Petition.*

scow and the New York docks, when there was no necessity for her so doing.

6. In that she attempted to take a tow through the East River, which was too heavy and cumbersome for her to handle in safety.

7. In that she attempted to pass too close to the anchored drill scow at a place where there was abundance of sea room and no occasion for her so doing.

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8. In that she misjudged the force and set of the tide.

9. In that she brought her tow into contact with the drill scow which was at anchor and motionless.

SIXTH: Thereafter the said libel, filed as aforesaid against the steamtug "Mahanoy" in rem, was amended so as to make said libel in personam against Walker D. Hines, Director General of Railroads as agent.

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SEVENTH: Your petitioner alleges that the true facts and circumstances of the said collision and damages were as follows:

On the 7th day of November, 1919, the steamtug "Mahanoy" with seventeen (17) loaded coal boats in tow, in five tiers on two hawsers of about 40 fathoms in length, was proceeding from the vicinity of the Statue of Liberty to the East River shaping her course for about the center

of the East River. The tide was flood, the weather was clear and the wind was blowing strongly from the northwest. 139

As the "Mahanoy" approached the mouth of the East River her captain saw the dredge "McMartin" anchored near the middle of the stream but a little nearer the New York shore. He proceeded between the "McMartin" and Governors Island. As he neared the "McMartin" he saw a drill anchored in about the center of the stream between the Wall Street ferry-slip and Pier 8, Brooklyn, and a bucket dredge about 500 or 600 feet off Pier 16, Brooklyn. There were also several barges tied up at the ends of piers along the Brooklyn shore. This condition rendered the channel between the drill and the Brooklyn shore so narrow that, with the flood tide also setting over toward the Brooklyn shore, it was unsafe for the "Mahanoy" with her tow to attempt to pass on to the Brooklyn side of the drill. Her master, therefore, as soon as her tow had cleared the "McMartin", began to haul in toward the New York shore to pass between the drill and the New York shore. 140

When the "Mahanoy" was about abreast of Piers 5 and 6 her master noticed the tug "Athens" then about abreast of Pier 13 coming down the river along the New York shore with three floats and he steered to pass as close to her as was safe. At the same time looking back he noticed the tug "Transfer No. 20" astern of his tow, coming into the East River with a car float on each side of her nd hauling in between the "Mahanoy's" tow and the New York shore. The master of the "Mahanoy" seeing that it would 141

be unsafe for the "Transfer No. 20" to attempt to pass her with her tow before the "Mahanoy" and her tow had passed clear of the drill at once sounded an alarm to hold back the "Transfer No. 20". The "Transfer No. 20" gave no heed to this signal but came on with unabated speed proceeding up along the port side of the "Mahanoy's" tow and at such a speed that it was apparent that she would likely get abreast of both the "Athens" and the "Mahanoy" at the same time. Seeing this situation the master of the "Mahanoy" again signalled an alarm to the
143 "Transfer No. 20" to hold back and permit him to haul on toward the New York shore. Again the "Transfer No. 20" ignored the alarm of the "Mahanoy" but as before came on with undiminished speed and crowded in between the "Athens" and the "Mahanoy" and her tow coming so close to the "Mahanoy" that her starboard float rubbed against the bow fender of the "Mahanoy".

The insistence of the "Transfer No. 20" upon passing between the "Athens" and the "Mahanoy" and her tow forced the "Mahanoy" to slow down to one bell to let the "Transfer No.
144 20" pass as quickly as possible. This caused the "Mahanoy", in the tide then running, to lose control of her tow so that the flood tide caught the tow carrying it over toward the Brooklyn shore, and, although as soon as the "Transfer No. 20" had cleared, the "Mahanoy" hauled in at once toward the New York shore at full speed ahead in an effort to pull her tow clear of the drill, she was unable to do so and the tide brought her tow into collision with the drill, do-

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ing considerable damage to said drill and to several of the boats of the "Mahanoy's" said tow.

EIGHTH: That the aforesaid collision and consequent damage were not caused or contributed to by any fault or neglect on the part of the said steamtug "Mahanoy" or those in charge of her, but were wholly and solely due to the fault and neglect of the steamtug "Transfer No. 20" and those in charge of her, in the following, among other particulars, which will be pointed out at the trial of this action:

146

(1) In that those in charge of the steamtug "Transfer No. 20" were incompetent and inattentive to their duties.

(2) In that those in charge of the steamtug "Transfer No. 20" failed to maintain a proper and vigilant lookout.

(3) In that those in charge of the steamtug "Transfer No. 20" disregarded all signals of the "Mahanoy".

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(4) In that those in charge of the steamtug "Transfer No. 20" under the conditions which must have been apparent to them, persisted in crowding between the "Athens" and the "Mahanoy" instead of giving these tugs and their tows time to pass each other and to clear the drill.

(5) In that those in charge of the steamtug "Transfer No. 20" failed to take prop-

148 *Petition.*

erly into consideration the movements of the tide.

(6) In that those in charge of the steam-tug "Transfer No. 20" crowded in between the "Mahanoy" and the "Athens" and their tows and forced the "Mahanoy" to slow down so that the tide could and did carry her tow upon the drill.

(7) In that those in charge of the steam-tug "transfer No. 20" did not pass up the
149 river between the Brooklyn shore and the drill scow "No. 3".

(8) In that those in charge of the steam-tug "Transfer No. 20" failed to slacken her speed on approaching the "Mahanoy".

(9) In that those in charge of the steam-tug "Transfer No. 20" proceeded at too great a speed.

(10) In that those in charge of the steam-tug "Transfer No. 20" being the overtak-
150 ing boat, failed to keep her out of the way of the "Mahanoy" and her tow.

(11) In that those in charge of the steam-tug "Transfer No. 20" did nothing to avoid the accident.

NINTH: That by reason of the premises the said John Barton Payne, Director General of Railroads as agent aforesaid, of the New York

New Haven & Hartford Railroad Company is wholly and solely liable for whatever amount may be decreed to the libellant herein, if any, and is therefore a necessary and proper party to this suit and should be proceeded against herein. 151

TENTH: All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, your petitioner prays that a monition in due form of law, according to Admiralty and Maritime jurisdiction, issue against the said John Barton Payne, Director General of Railroads, as agent as aforesaid of the New York, New Haven & Hartford Railroad Company, and that he be cited to appear and answer on oath all and singular the matters in the libel and petition herein and that if any damages should be decreed to the libellant herein then that the decree may be entered herein against the said John Barton Payne, Director General of Railroads, as agent for the said New York, New Haven & Hartford Railroad Company and that your petitioner may have such other and further relief as may be just and proper in the premises. 152 153

HARRINGTON, BIGHAM & ENGLAR,
Proctors for Petitioner,
Office and Post Office Address,
No. 64 Wall Street,
Borough of Manhattan,
New York iCty.

154 *Petition.*

State of New York, }
County of New York, } ss.:

T. Catesby Jones, being duly sworn, depose and says; That he is a member of the firm o Harrington, Bigham & Englar, proctors for th respondent herein; that he has read the fore going petition and knows the contents thereof and that the same is true to the best of hi knowledge, information and belief.

That the reason this verification is made by
155 deponent and not by respondent, is that respond ent is not now within this jurisdiction.

That the sources of deponent's informatio and the grounds of his belief are statements mad by the respondent and documents in the possses sion of deponent.

T. Catesby Jones.

Sworn to before me this
29 day of June, 1290.

P. J. R. McEntegart,
156 Notary Public, New York County,
New York County Clerk's No. 120,
New York Register's No. 2102,
Certificate Filed in Kings Co.,
Clerk's No. 47, Register's No. 2043,
Commission Expires March 30, 1922.

(Notarial Seal)

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Notice of Appearance.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,
against
WALKER D. HINES, as Director General of Railroads and Agent (Lehigh Valley Transportation Company),
Respondent,
and
JOHN BARTON PAYNE, Director General of Railroads as Agent for The New York, New Haven and Hartford Railroad Company,
Respondent-Impleaded.

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SIRS:

PLEASE TAKE NOTICE that the respondent, JOHN BARTON PAYNE, Director General of Railroads as Agent for the New York, New Haven and Hartford Railroad Company, impleaded under the 59th Rule, appears in the above entitled proceeding and that I am retained as proctor for him there-

160 *Notice of Appearance.*

in and demand that a copy of all papers in this proceeding be served on me at my office in the Grand Central Terminal, Borough of Manhattan, City of New York.

Dated, New York City, July 6, 1920.

Yours, etc.,

CHARLES M. SHEAFE, JR.,
Proctor for Respondent-Impleaded,
Office and Post Office Address,
161 Room 3610 Grand Central Terminal,
Borough of Manhattan,
City of New York.

To:

HARRINGTON, BIGHAM & ENGLAR, Esqs.,
Proctors for Petitioner,
64 Wall Street,
New York City.

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Notice of Motion.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

WALKER D. HINES, Director General and Agent of the United States Railroad Administration on account of the Lehigh Valley Tug "MAHANOY",
Respondent,

164

and

WALKER D. HINES, Director General and Agent of the United States Railroad Administration on account of the New Haven "TRANSFER No. 20",
Respondent.

165

SIRS:

PLEASE TAKE NOTICE, that upon the annexed Bill of Exceptions, the respondent. John Barton Payne, will move this Court at a Stated Term

166 *Notice of Motion.*

thereof for the hearing of motions to be held in Room 235, in the Post Office Building, in the Borough of Manhattan, City of New York, on the 15th day of October, 1920, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order dismissing the libel and petition of John Barton Payne, filed herein, but without costs, and for such other and further relief as the Court may deem proper.

Dated, New York City, October 7th, 1920.

167 Yours, etc.,

CHARLES M. SHEAFE, JR.,
Proctor for Respondent.

To:

HARRINGTON, BIGHAM & ENGLAR, Esqs.,
Proctors for Libellant and Petitioner,
64 Wall Street,
New York City.

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Bill of Exceptions. 169

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

WALKER D. HINES, Director General and Agent of the United States Railroad Administration on account of the Lehigh Valley Tug "MAHANOY", 170
Respondent,

and

WALKER D. HINES, Director General and Agent of the United States Railroad Administration on account of the New Haven "TRANSFER No. 20", 171
Respondent.

The respondent, JOHN BARTON PAYNE, as successor to WALKER D. HINES, Director General of Railroads and Agent, on account of New Haven "Transfer No. 20", hereby excepts to the libel and petition of JOHN BARTON PAYNE, as successor to WALKER D. HINES, Director General of Railroads and Agent, on account of the Lehigh

172 *Bill of Exceptions.*

Valley Tug "Mahanoy", filed herein, on the fol lowing grounds:

FIRST: That at the time of the alleged collision on November 7th, 1919, both the Lehigh Valley tug "Mahanoy" and the New Haven "Transfer No. 20" were solely under the control and management of and were being operated solely by Walker D. Hines, Director General of Railroads, and that for this reason no cause of action ever accrued to the said Walker D. Hines, operating the said tug "Mahanoy" as against
173 the said Walker D. Hines, operating the New Haven "Transfer No. 20", or against John Barton Payne, his successor.

SECOND: On the ground that the said Walker D. Hines, or his succesor, John Barton Payne, is not entitled to maintain said libel and petition against the said Walker D. Hines, or his successor, John Barton Payne, on account of the said New Haven "Transfer No. 20" and no cause of action now exists or ever has existed in favor of said libellant and petitioner for or by reason of any matter, or thing connected with
174 the operation of said New Haven "Transfer No. 20".

THIRD: Upon the ground that under and pursuant to the Acts of Congress respectively approved August 29th, 1916, March 21st, 1918, and February 28th, 1920, and the proclamations of the President issued thereunder, the United States has duly made provision for the payment out of the Treasury of the United States of all judgment, decrees and awards entered or thereafter to be entered against the Director General

of Railroads as Agent, under the Transportation Act of 1920, in satisfaction of such judgments, decrees or awards resulting from causes of action which arose out of the possession, use or operation by the President of the railroads or systems of transportation of carriers under the aforesaid statutes; and it is a matter of common knowledge that pursuant to the aforesaid statutes, orders and regulations, any decree for damages to which the original libellant herein may be entitled will necessarily be satisfied pursuant to law out of a common fund belonging to the United States and either derived from the operation of said roalroads, including the transportation system of the Lehigh Valley Transportation Company, the Lehigh Valley Railroad Company and The New York, New Haven and Hartford Railroad Company, or out of the revolving fund or funds appropriated by the aforesaid Acts.

FOURTH: That the said libel and petition of John Barton Payne is unauthorized and unwarranted by law or by any of the aforesaid statutes or the orders and regulations of the United States Railroad Administration pursuant thereto.

WHEREFORE, respondent prays that the said libel and petition be dismissed but without costs.

CHARLES M. SHEAFE, JR.,
Proctor for Respondent,
JOHN BARTON PAYNE, as successor, etc.,
Office and Post Office Address,
Room 3610, Grand Central Terminal,
Borough of Manhattan,
City of New York.

178 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THE NEW JERSEY SHIPBUILDING AND DREDGING COMPANY,

vs.

TUG "MAHANOY,

179 W. J. FEE COAL CO.,

vs.

DIRECTOR GENERAL OF RAILROADS, (LEHIGH VALLEY RAILROAD COMPANY).

JAMES MCWILLIAMS BLUE LINE,

vs.

DIRECTOR GENERAL OF RAILROADS, (LEHIGH VALLEY RAILROAD COMPANY).

180

Before: Hon. LEARNED HAND, *D. J.*

January 11, 1922, 3:30 p. m

APPEARANCES:

ALEXANDER & ASH, By Peter Alexander, Esq. for N. J. Shipbuilding & Dredging Co.,

Charles D. Pullen—For New Jersey Shipbuilding & Dredging Co.—Direct. 181

BIGHAM, ENGLAR & JONES, By Henry B. Potter, for all respondents.

PARK & MATTISON, By Anthony V. Lynch, Jr., Esq., for W. J. Fee Coal Co.

HERBERT GREEN, Esq., for James McWilliams Blue Line.

Counsel state their claims.

182

CHARLES D. PULLEN, a witness called on behalf of the New Jersey Shipbuilding & Dredging Co., being duly sworn, testified as follows:

Direct Examination by Mr. Alexander:

Q. Mr. Pullen, where do you reside? A. 1604 Crotona Park, East, New York City.

Q. Are you connected with the New Jersey Shipbuilding & Dredging Company? A. Vice-President and treasurer. 183

Q. Were you vice-president and treasurer of that company on November 7, 1919? A. I was.

Q. In what state is that company incorporated? A. In the State of New Jersey.

Q. What business is it engaged in? A. Dredging, rock excavation.

Q. Do you know the drill scow No. 3? A. Very well.

184 *Charles D. Pullen—For New Jersey Shipbuilding & Dredging Co.—Direct.*

Q. Who was the owner of that drill scow on November 7, 1919? A. The New Jersey Shipbuilding & Dredging Co.

Q. Did your company have a contract with the United States with reference to the excavation of rock in the East River? A. It did.

Q. What is known as the Clark Street area? A. Yes.

Q. Is that the area marked on the blueprint which I show you? A. It is the official map of the War Department with the area marked.

185

Mr. Alexander: I offer it in evidence.

Received and marked Libellants Exhibit 1.

Q. I show you, Mr. Pullen, a contract, and I ask you to state whether or not that was a contract made with the Government covering the excavation on the area shown on blueprint Exhibit 1? A. This is the original contract signed by Col. Edward Burr, for the United States Government.

Q. And your company? A. And my company.

186

Mr. Alexander: May I introduce a copy instead of the original.

The Court: Yes.

Q. Where was your drill scow on the afternoon of the 7th of November, 1919? A. Working in section 4 on the area named.

Q. You were not on the drill scow at the time of the accident? A. No, sir.

Charles D. Pullen—For New Jersey Shipbuilding & Dredging Co.—Direct. 187

Q. What depth of channel were you excavating at that time? A. The channel to be forty foot, with two foot over-depth, forty-two foot.

Q. Do you know how your drill scow was made fast in the channel? A. Four two-ton anchors, 1¾″ chains and three steel spuds, 32″ square, 65″ long.

Q. How were they put down? On what part of the dredge are they put down into the river? A. They are put down through heavy castings through the hull of the vessel and from the sides, front and aft. 188

Q. One on each side and one on the stern? A. Yes, sir, on this particular drill.

Q. The drill scow has an equipment for drilling? A. Three drills.

Q. That is the bow end? A. That is the bow end.

Q. Do you know whether or not that vessel sustained any damage on November 7, 1919?

The Court: Now a good deal of this you need not prove.

Mr. Potter: You have denied in the Fifth Article of your answer, every allegation 189 in the Fifth article of the libel, except as admitted or modified in the Ninth Article of the Answer.

That is a mistake, that is the Tenth.

The Court: So that you may take the whole statement in the Tenth as in proof of your Fifth. You have read that. Does not that give a complete story such as you are content with?

190 *Charles D. Pullen—For New Jersey Shipbuilding & Dredging Co.—Direct.*

Mr. Alexander: Yes, sir. And there is no charge of negligence against the drill scow.

The Court: Then haven't you proved your case, now?

Mr. Alexander: I thought I might bring the superintendent, who was on board at the time, to testify as to the contract.

The Court: Don't they admit the contract in the Tenth Article?

191 Mr. Potter: It does on page 5, in the first three lines on the top of page 6.

Mr. Alexander: Yes, it alleges the contact. That covers our case.

No Cross-Examination.

The Court: Now that proves all your case.

Mr. Alexander: Yes, I think it does.

192 Mr. Lynch: I am in this position. Through Mr. Potter's kindness, he was going to concede incorporation and ownership, and I didn't bring Mr. Fee down, as he was planning to take a trip to California. I can prove ownership, but not incorporation by my master.

Mr. Potter: I would like to withdraw from that agreement.

Mr. Lynch: I will get Mr. Fee down tomorrow morning.

Mr. Potter: I did make that agreement, but I feel that I will have to withdraw it.

 193

Mr. Lynch: Then I will have to get Mr. Fee tomorrow morning.

The Court: Can't you get a certified copy of the Letters of Incorporation tomorrow morning?

Mr. Lynch: I think it would be better to get Mr. Fee down here.

JOHN JOHNSON, a witness called on behalf of the Fee Coal Company, being duly sworn, testified as follows: 194

Direct Examination by Mr. Lynch:

Q. Captain Johnson, on November 7, 1919, were you master of the boat William J. Fee? A. Yes, sir.

Q. Do you know who she is owned by? A. Mr. William Fee.

Q. On November 7, 1919, was your boat in tow of the Lehigh Valley tug Mahanoy? A. Yes, sir.

Q. Was your boat in contact, in collision, with a dredge or a drill in the East River, on November 7, 1919? Did it hit it? (No answer). 195

The Court: Did your boat hit the drill?

Witness: No, sir, not on November 7.

The Court: What date was it?

Witness: It was November 5, 1919.

Mr. Lynch: I will have to get the original protest. He stated it was November 7.

196 *John Johnson—For Fee Coal Company—Direct.*

Q In what position in the tow was your boat? A My boat was in the third tier.

Q. On which side of the tow? A. The starboard side of the tow.

Q. She was the outside boat at the time you struck the drill? A. She was the second boat inside—

Q. At the time she struck the drill was she the outside boat? A. Yes, sir, at that time she was the outside boat.

Q. Was some demage sustained by her? A. The whole side was stove in her.

197 Q. Where was she taken after the collision? A. Between Piers 7 and 8.

Q. Did she sink? A. Right off, quick.

The Court: She was in tow of the tug Mahanoy?

Witness: Yes, sir.

The Court: You had come up from Port Reading?

Witness: No, sir, from the Perth Amboy stakes. Oh no, Pennsylvania stakes.

The Court: And you came up through the Bay?

198 Witness: Yes, sir.

The Court: How many were there in the tow after you left Staten Island?

Witness: We were eighteen boats.

The Court: You rounded at the Battery, and were coming up the East River?

Witness: No, we first landed at Liberty Light and hung there while the Port Reading tug, the Wyomissing, took out the Dickinson that was tied on the side of me.

199

The Court: That left you seventeen?

Witness: That left us seventeen, yes, sir.

Cross Examination by Mr. Green:

Q. When the boats hit that dredge, what happened, was the tow broken up? A. Which barge? My boat?

Q. When the tow hit the dredge, was the tow broken up by it? A. Sure, sir, right off, everything went to pieces, all apart.

200

Q. The boats all banged against one another? A. They certainly did, yes. The tide was flood and they run up and banged everything.

Mr. Potter: No cross examiation.

WILLIAM LYLE, a witness called on behalf of the McWilliams Blue Line, being duly sworn, testified as follows:

201

Direct Examination by Mr. Green:

Q. On November 7, 1919, you were captain of the barge S. E. Vincent? A. I was, yes, sir.

Q. Owned by the James McWilliams Blue Line? A. Yes, sir.

Q. And you had been captain of that boat for some time? A. About a year.

202 *William Lyle—For McWilliams Blue Line—Direct.*

Q. You were in that tow that went up the East River that day? A. Yes, sir.

Q. In tow of the Mahanoy? A. Yes, sir.

Q. Where was your boat in the tow? A. The second tier, behind the hawser boat on the starboard side.

Q. You were the outside boat on the starboard side in the second tier? A. Yes, sir.

Q. Did your boat hit that dredge? A. She did.

Q. What part of your boat? A. Just aft of midships, forward of the cabin.

203 Q. Was she damaged? A. She was, threw everything off, threw the deck in.

The Court: You sank at Whitestone next morning?

Witness: No, sir, not my boat.

Q. When the tow hit the dredge was it broken up? A. Yes, sir.

Q. What happened to the boats? A. They all pounded together there.

Q. How long did that last? A. Well, until the assistance came to help pull us out, maybe half

204 an hour we were bumping around that way.

Q. And then some tugs got control of the tow? A. Yes, sir.

Q. And went on with it? A. Yes, sir.

Q. Now the tow was taken to Newtown Creek, was it? A. Yes, sir.

Q. After this accident? A. Yes, sir.

Q. And after the tugs resumed the towing? A. Yes, sir.

William Lyle—For McWilliams Blue Line—Direct.

Q. What time did you get there? A. I should judge somewhere around seven o'clock.

Q. How long did you stay there? A. Sometime I think around the morning, one o'clock, somewhere around there.

Q. Early in the morning? A. Early in the morning.

Q. What boat took your boat in tow? A. The John Garrett.

Q. And what other boats? A. The Edgar Jones and the Daniel R. Roe.

The Court: Three boats in all?
Witness: Three boats in all.

Q. Where did she take them to? A. The stakeboat, Whitestone.

Q. How was that tow arranged? A. I was in the hawser tier on the starboard side. The Edgar Junior was on the port hand, and the Daniel Roe was under my stern.

Q. And on your way to Whitestone, did you notice whether or not the Captain of the Daniel Roe was pumping? A. He was.

Q. Did you speak to him about it? A. I did. I offered to give him a hand and he said he could handle it himself.

Q. What time did you get to Whitestone? A. Somewhere around three in the morning, I should think, three or half past, something like that.

Q. Were you in bed when you got there? A. No, sir.

208 *William Lyle—For McWilliams Blue Line—Cross.*

Q. Were you on deck? A. I was on deck, yes, sir.

Q. Did you notice anything peculiar about the Daniel R. Roe? A. I saw the captain pumping, and I asked him if he was leaking bad.

Q. After you got to Whitestone? A. After we got to Whitestone.

Q. Did you notice anything about his boat, anything happen to it? A. No, just at that moment.

209 Q. Later on? A. Later on I noticed his decks were under water.

Q. What time was that? A. I should judge that was around five o'clock.

Q. And then what happened? A. The John Garrett came and shoved her on the flats after she was filled with water.

Q. She sank? A. She sank.

Q. Your boat and the Roe were both loaded with coal? A. Yes, sir.

Q. What kind of coal? A. I think I had nut coal on.

Q. Hard coal? A. Hard coal.

210 Q. Did the Roe have hard coal also? A. She did.

Cross Examiation by Mr. Lynch:

Q. Did you see the boat William J. Fee in the same tow? A. She was under my stern.

Q. And this accident happened on what date? A. The 7th of November.

William Lyle—For McWilliams Blue Line—Cross.

Mr. Lynch: I think that covers me on the date.

The Court: Yes.

By Mr. Potter:

Q. Did you come into collision with any other boat after the occurrence you have just narrated? A. What is that?

Q. Did your boat come into collision with any other boat after the alleged collision with the drill? A. No, sir.

Q. Are you sure you were on the boat during this time? A. I certainly was.

Q. Where was your boat in the tow? A. I was in the second tier from the hawser, I had my wife standing forward and she was going to get off on the other boat, I saw we was going to hit the drill before we hit it.

Mr. Green: Do you want me to put on any more witnesses as to our boat sinking as the result of the collision?

Mr. Potter: I am afraid we are going to get some collateral issues here. I do not know what happened after the collision with the drill.

Mr. Green: He testified that she sank.

Mr. Potter: The question has been raised whether she sank as the result of coming in contact with the drill.

214 *John Greenwood—For McWilliams Blue Line—Direct.*

JOHN GREENWOOD, a witness called on behalf of the James McWilliams Blue Line, being duly sworn, testified as follows:

Direct Examination by Mr. Green:

Q. Where do you live? A. New Suffolk, Long Island.

Q. You don't work for the James McWilliams
215 Blue Line, do you? A. Not at the present time.

Q. You are a son of John Greenwood? A. Yes, sir.

Q. Your father used to work for the James McWilliams Blue Line? A. Yes, sir.

Q. And he was captain of the Roe? A. He was captain of the Roe.

Q. Where is he now? A. In California, he went there eighteen months ago.

Q. Has he been back since? A. No, sir.

Q. How old is he? A. Abount seventy-four years old.

Q. You think he will stay there the rest of his
216 life? A. Yes, sir.

Q. He is out there with relatives? A. Yes, sir.

The Court: The question you raise, Mr. Potter, is a question of the amount of damages anyway, so that I should not decide it here. They do not dispute that you were injured, but how much the in-

juries were. That will go before the Commissioner.

Mr. Green: Then my right is reserved?

The Court: Oh, yes, the extent of your damages you will have to prove before a Commissioner.

DANIEL R. ROE, a witness called on behalf of the James McWilliams Blue Line, being duly sworn, testified as follows: 218

Direct Examination by Mr. Green:

Q. You are secretary of the James McWilliams Blue Line? A. Yes, sir.

Q. And you have been for how many years? A. Four years.

Q. Do you remember the sinking of the boat D. R. Roe? A. Yes, sir.

Q. You had charge of everything in connection with her repair, and so on? A. Yes, sir. 219

Q. Who owned the D. R. Roe and the S. E. Vincent? A. The James McWilliams Blue Line, Incorporated.

Q. And it is incorporated under the laws of what State? A. New Jersey.

No Cross Examination.

220

The Court: That is the case of the libellants.

Mr. Potter: Is it agreeable to have the case go over to tomorrow so that someone representing the Director General may make whatever statement, or objection, there may be so that we may have a record on this point?

The Court: Yes. If you have any testimony or evidence of any kind in traverse of the issues which have been now supported by the libellants proof, I would like to have that in tonight, so that the only thing to take up to-morrow will be the validity of your pleas.

221

Mr. Green: I have nothing to deny.

The Court: The case is closed on the allegations in the libel. Tomorrow morning the question of the validity and proof of the respondents' defense will be taken up and you will be allowed to put in your proof of incorporation, Mr. Potter. If you want to bring in the proctor for the Director General I will be pleased to hear him at any length he wishes.

222

The Court states that the witnesses need not come back tomorrow.

John L. Fee—For W. J. Fee Coal Company—Direct. 223

January 12, 1922.

Case resumed.
Same appearances.

JOHN L. FEE, a witness called on behalf of W. J. Fee Coal Company, being duly sworn, testified as follows:

224

Direct Examination by Mr. Lynch:

Q. Are you an officer of William J. Fee Coal Company? A. I am.

Q. Is the William J. Fee Coal Company a corporation? A. It is.

Q. Incorporated under the laws of what State? A. New York.

Q. Where is your main office? A. Mount Vernon.

Q. On November 7, 1919, was the William J. Fee Coal Company the owner of the coal boat William J. Fee? A. They were. 225

No Cross Examination.

The Court: Mr. Potter was to advise with the general counsel of the Director General.

Mr. Thompson states that he represents the Director General.

226 The Court: You know the situation?

Mr. Thompson: Yes, sir, I will make a statement after Mr. Potter gets through.

Mr. Potter: Respondent offers to prove that the collision and alleged damages were not caused or contributed to by any fault or neglect on the part of the steamtug "Mahanoy", or those in charge of her, but were wholly and solely due to the fault and neglect of the steamtug Transfer No. 20 and those in charge of her.

The Court: You are willing to concede that the No. 20 was at that time part of the equip-
227 ment of the New York, New Haven & Hartford Railroad, and that that was in the possession and control of the Director General?

Mr. Potter: Yes, sir. Now, as I understand it, you will exclude all that evidence?

The Court: Yes, on the ground that it does not vary the liability of the Director General, that the only respondent in this case is the Director General, who at that time was in control of both railroads in question and both tugs, that the Director General was operating then a single system of common carriage by means of the equipment of both railroads, and that therefore
228 it makes no difference whether the negligence which caused the injury was due to the crew of the Mahanoy or the crew of the New Haven boat; in either case the injury was due to an agent of the Director General, who, as I have said, was a single carrier. That being true, I find that the testimony is irrelevant to the issue, just as irrelevant as though in the case of a private corporation it was urged that one set of servants was innocent of negligence which

caused damage to an outsider, that negligence arising from another set of servants; just as much as though two tugs of the New Haven Railroad or two tugs of the Lehigh Valley Railroad were involved, I might find one was quite innocent and the other was at fault, but it would make no difference in the disposition of the case. The libellant has been injured by one of two sets of servants concededly, and that would be enough to charge the common carrier with liability. 229

Mr. Potter: May I have an exception?

The Court: Yes. 230

The Court: Of course, that is a provisional ruling until I have heard you and Mr. Thompson.

Mr. Potter: Yes, sir. We also have in the twelfth article of our libel in each of the cases reserved the right to limit our liability to the value of the tug, Mahanoy.

The Court: I will reserve that. That point will arise only in the event that the amount of the damages is larger than the smaller of the two values, the Mahanoy and the Transfer No. 20. If it turns out that the aggregate of damages is larger than the value of the less valuable of the two tugs, that question will arise, and will necessarily come up for determination. I will hear the libellants if they have anything to say on that question. 231

Mr. Alexander: I think that if that question is reserved it will be satisfactory. I had hoped that Mr. Potter could bring both of the tugs in, and we could show that they were both at fault. I shall be glad to have them both in, but I agree that the question of limitation should be re-

232 *Case.*

served until the determination of the damages. I cannot tell now, nor can the court tell, which tug is at fault, and on which he can limit his liability.

(Discussion.)

The Court: I will reserve this until the damages are proved.

(Statement by Mr. Thompson for the Director-General).

233

The Court: At any time, this can be put in the form of an arbitration, so that the underwriters can be concluded. If they are willing to stand by the decision, I will take it up as an independent arbitration. I will not take it up where I have nothing to bind the parties but a conference with their attorneys.

Mr. Thompson: It would be a separate proceeding and will not be mentioned in the decree in this particular case.

The Court: I think it clearly irrelevant to the decree.

234 Mr. Thompson: I think it can be worked out. I will try to get the various attorneys together.

The Court: If they will make it a binding arbitration, I will hear it.

Mr. Thompson: Now for the purpose of the record I want to make an objection to the jurisdiction of the court to hear and determine this action as an action in personam against the Director General as agent under Section 206 of the Transportation Act, on the ground that

there has been no service such as is provided in Section 206 of the Transportation Act to bring the Director General as agent into court, and upon the further ground that this is in effect an action against the sovereign, and the consent to sue the sovereign is embraced in Section 206 of the Transportation Act of 1920, and that the libellant has not followed the procedure outlined in that section of the Act in order to bring the sovereign before the court. 235

The Court: Do you wish to be heard on that?

Mr. Thompson: Yes, sir. 236

Mr. Green: That would go to the validity of our decrees.

The Court: Yes. I will hear them on it.

(Discussion.)

The Court: I will overrule that.

Mr. Thompson: Exception.

The Court: The Proctor for the Director General has raised the question that under Section 206-b no suit can be started except by the service of a monition. Now it appears in this case that there was no monition ever served on the Director General or on any agent of any of the companies authorized to receive process by the contracts specified in Section 206-b. The defendant was brought into court by an appearance of Harrington, Bigham & Englar, its proctors, and this appearance it is conceded was authorized if the Director General might appear voluntarily by any attorney like any other party; it was not authorized, however, if the Director Gen- 237

eral has no authority to authorize a proctor to appear for him in a suit in admiralty in which there has been no service of process. Therefore the question of the jurisdiction of this court is squarely raised by the Director General and involves the construction of Section 206-b, and that question in short is just this: Did Congress, when it said that process might be served upon the Director General or the agents appointed by him, intend to limit the beginning of suits to the formal service of process, or is it to be
239 interpreted as authorizing the Director General to avoid the necessity of the service of process upon him by authorizing an appearance just as any other party defendant may do? Literally, there is no provision authorizing such an appearance, but it seems to me very obvious that the purpose of Congress was no more than to say that the Director General should be a party defendant by the same procedural method as any other individual becomes such. There certainly can be no conceivable purpose in supposing that the mere delivery of a piece of paper like a monition to one of these agents was within the intent
240 of Congress, and so far as I can see, no difference whatever arises whether we assume that the Director General is allowed to appear as any other party respondent is allowed, or whether we insist that he be served with a monition. Such an interpretation of the statute would be formal and archaic in the extreme. I take it we are bound to give to the purpose of Congress fair latitude, and when a Director General is subjected to service like an individual, it is to be assumed that the ordinary methods of

241

bringing him before the court are available, both to the parties who sue him and to him if he wishes to avoid the purest of formalities.

I therefore overrule this point of jurisdiction and direct that an interlocutory decree pass in favor of the libellant in each of the three libels, to ascertain their damage. As I have already said, a question may subsequently arise as to the right of the Director General to limit. This case may then involve the question whether the tug Mahanoy or the tug Transfer No. 20 was at fault in the ordinary admiralty sense for this collision. It obviously cannot arise unless the 242
sum of all the recoveries here is greater than the value of the lesser tug, which is the Mahanoy. It is quite possible that the aggregate of all the damages may be less than the value of the Mahanoy, and it seems to me proper that that point should be reserved until the damages have been liquidated and when they are, and if they are greater than the value of the Mahanoy, it perhaps will become necessary, then perhaps if the parties cannot come to an accomodation, I shall have to decide whether the Mahanoy is to be surrendered in limitation or the Transfer No. 20, but until that fact appears it is obviously 243
unnecessary to determine that question.

244 **Order.**

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the United States Court and Post Office Building, in the Borough of Manhattan, City of New York, on the 11th day of January, 1922.

Present:

Honorable LEARNED HAND,
District Judge.

245

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

WALKER D. HINES, as Director General of Railroads, and Agent (Lehigh Valley Transportation Company),
Respondent,

246 and

WALKER D. HINES, Director General of Railroads, as Agent (New York, New Haven & Hartford Railroad),
Respondent-Impleaded.

The respondent-impleaded, John Barton Payne, as successor to Walker D. Hines, Director General of Railroads, as Agent (New York,

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New Haven & Hartford Railroad) having regularly moved for an order dismissing, without costs, the libel and petition of Walker D. Hines, as Director General of Railroads and Agent (Lehigh Valley Transportation Company),

Now, after reading and filing the bill of exceptions interposed by the respondent-impleaded and the notice of motion dated October 7th, 1920, with admission of service of a copy thereof upon the proctors for the libellant and for the respondent on the 8th day of October, 1920, and upon all the papers and proceedings heretofore 248
had herein, and after hearing William L. Barnett, Esquire, advocate on behalf of the respondent-impleaded in favor thereof, and Henry B. Potter, Esquire, advocate on behalf of the respondent in opposition thereto, and due deliberation having been had thereon, and on motion of Charles M. Sheafe, Jr., proctor for the respondent-impleaded, it is hereby

ORDERED, that the exceptions interposed by John Barton Payne, Director General of Railroads, as Agent (New York, New Haven & Hartford Railroad) as successor to Walker D. Hines, Director General of Railroads, as Agent (New 249
York, New Haven & Hartford Railroad), be, and the same hereby are sustained; and on like motion, it is hereby further

ORDERED, that the libel and petition be and the same hereby are dismissed without costs as against the said respondent-impleaded.

LEARNED HAND,
U. S. D. J.

250

Interlocutory Decree.

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the Court Rooms thereof, in the Post-Office Building, Borough of Manhattan, City of New York, on the 18th day of February, 1922.

251 Present:

HON. LEARNED HAND,
District Judge.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

252 JAMES C. DAVES, Director General of Railroads, as Agent under Section 206 of the Transportation Act of 1920.
Respondent.

This cause, which was originally brought against Walker D. Hines, Director General of Railroads, as agent under Section 206 of the Transporation Act, 1920, for a cause of action arising out of the operation of the steamtug

253 "Mahanoy" by the Director General of Railroads, (which steamtug was owned by the Lehigh Valley Transportation Company), having been duly heard upon the pleadings and proofs, and argued and submitted by the proctors for the respective parties, and the Court having rendered its decision at the close of the arguments, it is now, upon motion of Alexander & Ash, proctors for libellant

ORDERED that James C. Davis, now Director General and Agent as aforesaid, be substituted 254 as respondent in place and stead of said Walker D. Hines, formerly said Director General and said agent, without prejudice to any of the proceedings heretofore had in the cause; and in conformity with said decision, it is

ORDERED, ADJUDGED AND DECREED that the libellant herein recover against the respondent James C. Davis, as Director General and agent as aforesaid, the damages sustained by libellant by reason of the matters and things set forth in the libel, with interest and costs; and it is 255 further

ORDERED that it be referred to E. Curtis Rouse, Esq., as Special Commissioner, to ascertain and compute the libellant's said damages and report thereon to the Court with all convenient speed.

L. HAND,
U. S. D. J.

256

Citation.

THE PRESIDENT OF THE
UNITED STATES OF AMERICA,

To the Marshal of the Southern District of New York,

Greeting:

Whereas, a Libel was filed in the District
257 Court of the United States of America for the Southern District of New York, on February 19th, 1920, by the New Jersey Shipbuilding & Dredging Company, Libellant, against Walker D. Hines, Director General of Railroads (Lehigh Valley Transportation Company); And whereas said libel was amended by substituting James C. Davis, Director General of Railroads, as Agent (Lehigh Valley Transportation Company) in the place and stead of Walker D. Hines, as Director General of Railroads as aforesaid, by order entered in this court on the 20th
258 day of February, 1922, Respondent; in a certain cause civil and maritime, for damages for collision therein alleged to be due and owing to said Libellant, amounting to $60,000 and praying that a citation may issue against the said respondent pursuant to the rules and practice of this court.

Now, therefore, we do hereby command you, the said Marshal, to cite and admonish the said respondent, if found in your District, to be and

appear before the said District Court on the 7th day of March, 1922, at 10:30 A. M., at the Clerk's Office thereof, in the U. S. Court House and Post-Office Building, in the Borough of Manhattan, City of New York, then and there to file appearance and stipulation for costs, and to answer or except to said Libel within two weeks thereafter, otherwise the Libellant may enter an interlocutory or final decree as may be proper; and have you then and there this writ with your return thereon.

WITNESS, the Hon. LEARNED HAND, Judge of said court, at the Borough of Manhattan, City of New York, in said District, this 27th day of February in the year of our Lord one thousand nine hundred and twenty-two.

[SEAL]

ALEX. GILCHRIST, JR.,
Clerk.

ALEXANDER & ASH,
Proctors for Libellant.

262

Notice of Appearance.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

NEW JERSEY SHIPBUILDING & DREDGING COMPANY,
Libellant,

against

263 JAMES C. DAVIS, Agent (Lehigh Valley Transportation Co.),
Respondent.

SIR:

PLEASE TAKE NOTICE, That James C. Davis Agent, the Respondent above named, appears in this action, and that we are retained as his Proctors.

264 Dated, New York, March 6, 1922.

Yours, etc.,

BIGHAM, ENGLAR & JONES,
Proctors for Respondent,
64 Wall Street,
New York City.

To:

ALEXANDER & ASH,
Proctor for Libellant.

262-274

Office Supreme Court, U.S.
FILED
MAR 14 1923
WM. R. STANSBURY
Clerk

IN THE

Supreme Court,

OF THE UNITED STATES.

OCTOBER TERM—1922.

Original No. 27

JAMES C. DAVIS, Director General of Railroads, as Agent, operating the Lehigh Valley Transportation System,

Petitioner,

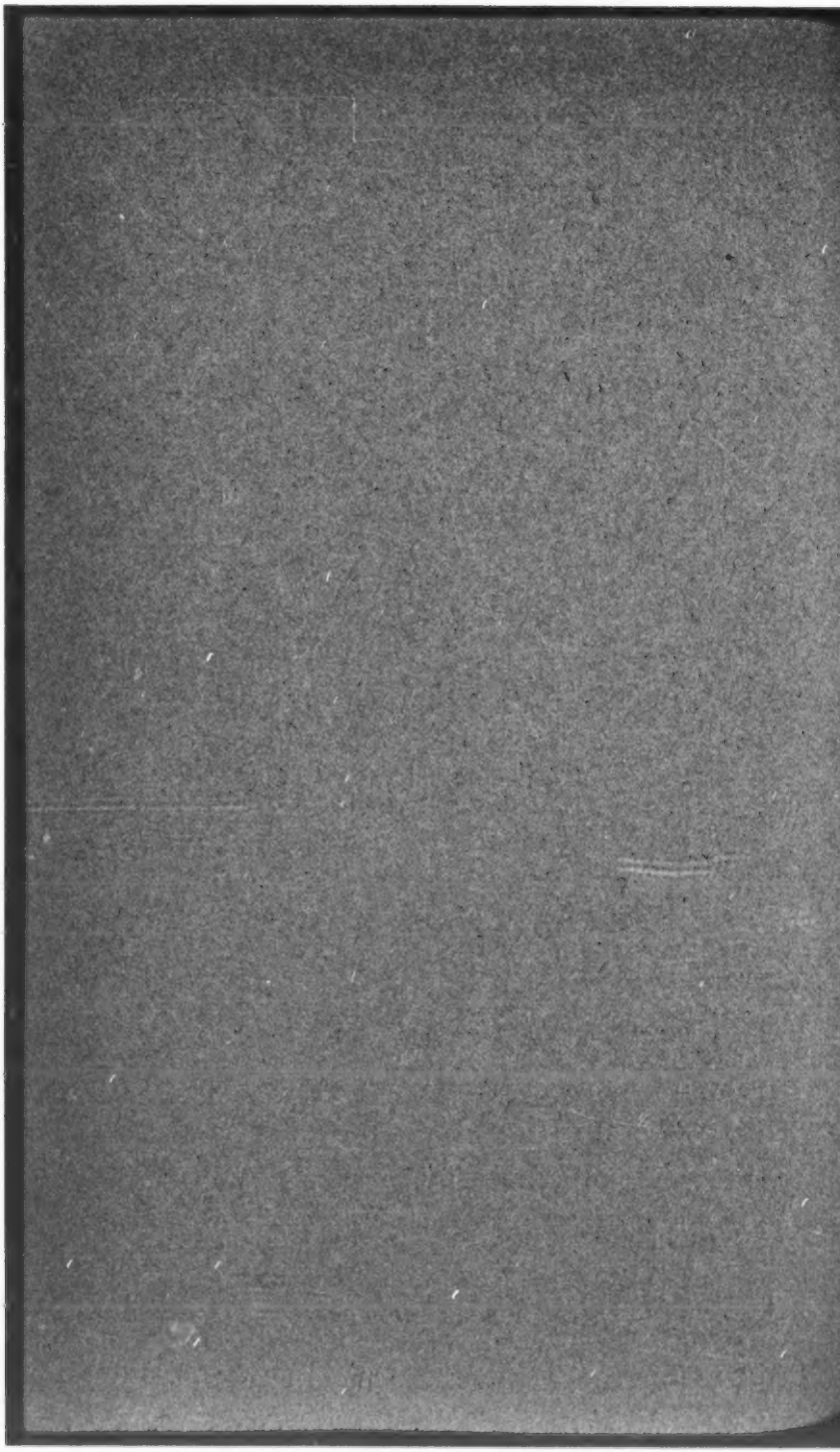
—against—

HONORABLE LEARNED HAND and the other Judges of the District Court of the United States for the Southern District of New York,

Respondents.

MEMORANDUM OF THE DIRECTOR GENERAL OF RAILROADS IN SUPPORT OF MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND/OR MANDAMUS.

T. CATESBY JONES,
JAMES W. RYAN,
Proctors for Petitioner,
64 Wall Street,
New York City.



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IN THE

Supreme Court,

OF THE UNITED STATES.

OCTOBER TERM—1922.

Original No. ——.

JAMES C. DAVIS, Director General of Railroads, as Agent, operating the Lehigh Valley Transportation System,

Petitioner,

—against—

HONORABLE LEARNED HAND and the other Judges of the District Court of the United States for the Southern District of New York,

Respondents.

MEMORANDUM OF THE DIRECTOR GENERAL OF RAILROADS IN SUPPORT OF MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF PROHIBITION AND/OR MANDAMUS.

Statement of the Facts.

A libel was filed in the United States District Court for the Southern District of New York on February 19th, 1920, by the New Jersey Shipbuilding & Dredging Company, as owner of Drill Scow "No. 3," against the steamtug "Mahanoy," wherein it was alleged that on November 7th, 1919, the steamtug "Mahanoy" negligently permitted her tow to collide with the said drill scow anchored in the East River. No appearance was entered on behalf of the "Mahanoy," nor

was process issued against the tug. Later, on May 24th, 1920, an order was entered in the United States District Court for the Southern District of New York, amending the libel as originally filed, the order providing that the libel should be amended by

> "substituting in the title, the first paragraph and the prayer therein, Walker D. Hines, as Director General of Railroads, and Agent, for and in the place of the steamtug 'Mahanoy,' her engines, etc., with the same force and effect as if the said Director General of Railroads had been originally made party respondent in said suit, and that said libel be further amended by inserting the following additional article:
>
> 'Ninth: Upon information and belief, the Lehigh Valley Railroad Company and its steamtug 'Mahanoy' at the time in the libel mentioned, was in the possession, use and operation of the President and the United States Railroad Administration acting through the said respondent Walker D. Hines, as Director General of Railroads.
>
> 'Pursuant to the provisions of Section 206 of the 'Transportation Act, 1920,' the respondent Walker D. Hines, as Director General of Railroads, was duly designated by the President of the United States the agent against whom shall be brought proceedings in admiralty, based on causes of action arising out of the possession, use or operation by the said President, of the railroads and systems of transportation of any carrier under the provisions of the Federal Control Act or the Act of August 29, 1916.
>
> 'Libellant's cause of action arises out of the possession, use or operation of the

> Lehigh Valley Railroad and its steamtug 'Mahanoy' as aforesaid, by the President acting through the Director General of Railroads, and this suit is brought against the latter in conformity with the provisions of said 'Transportation Act.'"

No process issued after the entry of the Order, but, acting under instructions of the Director General of Railroads, the firm of Harrington, Bigham & Englar, on behalf of the Director General of Railroads insofar as he was acting as agent for the Government in the operation of the Lehigh Valley Transportation Company, the transportation system which had owned and operated the "Mahanoy" until the railroads were taken over by the Government, filed an answer alleging that the injury complained of was not due to the fault of the steamtug "Mahanoy" nor to the fault of those in charge of her, but was wholly and solely due to the fault of the steamtug "Transfer No. 20" and those in charge of her. At the same time, a petition under the Fifty-sixth Rule in Admiralty was filed by John Barton Payne, Director General of Railroads, as agent operating the Lehigh Valley Transportation Company, against John Barton Payne, Director General of Railroads, as agent operating the New York, New Haven & Hartford Railroad Company, in which it was alleged that John Barton Payne, as agent operating the Lehigh Valley Transportation Co. was in no way liable for said disaster, but that John Barton Payne, Director General of Railroads, as agent aforesaid operating the New York, New Haven & Hartford Railroad Company, was wholly and solely liable for whatever amount might be decreed to the libel-

lant, if any, and that the Director General as operating the New Haven Railroad was a necessary and proper party to the suit.

An appearance was entered by Charles M. Sheafe, on behalf of John Barton Payne, Director General of Railroads, agent for the New York, New Haven & Hartford Railroad Company. Later, exceptions were filed to the petition, on the ground that, if Walker D. Hines, Director General of Railroads, operated both the Lehigh Valley Railroad Company and the New York, New Haven & Hartford Railroad Company, no cause of action arose which would sustain the petition which was filed in the case. These exceptions were sustained by the District Court, on the authority of the case of *Globe & Rutgers Fire Insurance Company* v. *Hines, Director General of Railroads*, 273 Federal 774.

The libellant then proceeded to prove its case, and offered evidence tending to show that the injury complained of was caused by one or more of the barges in tow of the "Mahanoy" coming into contact with the drill scow while she lay at anchor. The libellant then rested its case. The Director General of Railroads then offered to prove that the collision and the alleged damages were not caused or contributed to by any fault or neglect on the part of the steamtug "Mahanoy" or of those in charge of her, but was wholly and solely due to the fault and neglect of the steamtug "Transfer No. 20" and those in charge of her. The Court inquired whether counsel for the Director General of Railroads was willing to concede that the "No. 20" was, at that time, part of the equipment of the New York, New Haven &

Hartford Railroad Company, to which the Director General of Railroads said he was prepared to do. The Court then held that, as the Director General of Railroads was the only respondent in the case, and that, as he was in control of both railroads, it was immaterial whether the injury complained of was caused by the fault of the "Mahanoy" or by the fault of the "Transfer No. 20." The District Court said:

> "The Director General was operating then a single system of common carriers by means of the equipment of both railroads, and that therefore it makes no difference whether the negligence which caused the injury was due to the crew of the 'Mahanoy' or the crew of the New Haven boat; in either case the injury was due to an agent of the Director General, who, as I have said, was a single carrier. That being true, I find that the testimony is irrelevant to the issue, just as irrelevant as though in the case of a private corporation it was urged that one set of servants was innocent of negligence which caused damage to an outsider, that negligence arising from another set of servants; just as much as though two tugs of the New Haven Railroad or two tugs of the Lehigh Valley Railroad were involved. I might find one was quite innocent and the other was at fault, but it would make no difference in the disposition of the case. The libellant has been injured by one of two sets of servants concededly, and that would be enough to charge the common carrier with liability."

An exception was taken to this ruling of the Court. Mr. Thompson, appearing as special counsel for the Director General of Railroads, stated

for the purpose of record that he objected to the jurisdiction of the Court

> "on the ground that there has been no service such as is provided in Section 206 of the Transportation Act to bring the Director General as agent into Court, and upon the further ground that this is in effect an action against the sovereign, and the consent to sue the sovereign is embraced in Section 206 of the Transportation Act of 1920, and that the libellant has not followed the procedure outlined in that section of the Act in order to bring the sovereign before the Court."

The Court overruled this objection, and Mr. Thompson took an exception. The present counsel felt some delicacy in making the objection to jurisdiction of the Court on the ground that no process had issued in conformity with Subsection B of Section 206 of the Transportation Act, because they had entered a special appearance and filed an answer in the cause under the instructions of the Director General of Railroads. The lower court's discussion of this situation will be found in the record. See pages 76-81

Concededly no process was issued against the Director General of Railroads, as agent of the United States, as operator of the New York, New Haven & Hartford Railroad Company, and the requirements of the Transportation Act in this respect, have not been complied with.

The issues raised by this application are as follows:

> 1. Could the Director General of Railroads authorize a voluntary appearance in an action purporting to be brought under

the Transportation Act of 1920, when the provisions of such Act were not complied with?

2. Whether, in an action brought against the Director General of Railroads, as the operator of a particular transportation system, the Director General of Railroads can be held liable for torts committed by the servants and agents of another transportation system.

3. Whether, when Congress provided that the United States, after taking over the railroads, should be subject to all laws and liabilities of common carriers, there was any legal liability of the United States for injuries done persons whose claims did not arise out of a contract of carriage.

POINTS.

I.

Although, under the various acts of Congress and the executive orders issued while the railroads were under Federal control, suits were permitted to be brought against the Director General of Railroads, such suits were in fact suits against the United States.

It is believed that, since the decisions in *Missouri Pacific Railroad Co.* v. *Ault*, 256 U. S. 554; *Dahn* v. *Davis*, 258 U. S. 421, and *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 583, there is little question that, during the time that the railroads were being operated by the Director General, the Director General of Railroads was acting merely as agent for the Government, and that a suit against the Director General is in fact a suit against the United States.

In the *Dahn* case, this Court said:

> "It was definitely held in *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554, that, at all of the times here involved, Section 10 of the Federal Control Act, permitted the Government, through its Director General of Railroads, to be sued for any injury negligently caused on any line of railway in his custody, precisely as a common carrier corporation operating such road might have been sued, and that recovery, if any, would be from the United States.
>
> Thus plainly the petitioner had the right to sue the Director General of Railroads for negligently injuring him, and if successful his recovery must have been from the United States."

And, in the *Wisconsin Railroad Commission* case, this Court said:

> "From January 1, 1918, until March 1, 1920, when the Transportation Act went into effect, the common carriers by steam railroad of the country were operated by the Federal Government."

And *In re Tidewater Coal Exchange*, 280 Federal Reporter 648, 650, the Circuit Court of Appeals for the Second Circuit said:

> "The United States, in operating the railroads during the period of federal control, was engaged in the performance of a governmental function, and was not carrying on a merely private commercial enterprise."

II.

Elaborate provisions are made by the Transportation Act as to how actions may be brought against the United States arising out of the operation of railroads. The lower Court has held that, because of the decision in *Globe & Rutgers Fire Insurance Co.* v. *Hines*, 273 Fed. 774, these provisions need not be complied with if the Director General is before the Court representing a carrier other than the one sought to be charged with negligence.

Section 206 is set forth in full in the appendix to the petition to which this brief is annexed. For the convenience of the Court we are quoting again subsections A and B of Section 206:

> "Sec. 206. (a) Actions at law, suits in equity and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Act of August 29, 1916) of such character as prior to Federal control could have been brought against such carrier, may, after the termination of Federal control, be brought against an agent designated by the President for such purpose, which agent shall be designated by the President within thirty days after the passage of this Act. Such actions, suits, or proceedings may, within the periods of limitation now prescribed by State or Federal statutes but not later than two years from the date of the passage of this act, be brought in any court which but for

> Federal control would have had jurisdiction of the cause of action had it arisen against such carrier.
>
> (b) Process may be served upon any agent or officer of the carrier operating such railroad or system of transportation, if such agent or officer is authorized by law to be served with process in proceedings brought against such carrier and if a contract has been made with such carrier by or through the President for the conduct of litigation arising out of operation during Federal control. If no such contract has been made process may be served upon such agents or officers as may be designated by or through the President. The agent designated by the President subdivision (a) shall cause to be filed, upon the termination of Federal control, in the office of the Clerk of each District Court of the United States, a statement naming all carriers with whom he has contracted for the conduct of litigation arising out of operation during Federal control, and a like statement designating the agents or officers upon whom process may be served in actions, suits, and proceedings arising in respect to railroads or systems of transportation with the owner of which no such contract has been made; and such statements shall be supplemented from time to time, if additional contracts are made or other agents or officers appointed."

The Court will observe that, by subsection A of section 206, the privilege was given to suitors to bring actions at law, suits in equity and proceedings in admiralty based on causes of action arising out of the possession, use, or operation of the President of the railroad or system of transportation of any carrier of such character

as prior to Federal control could have been brought against such carrier if privately operated.

By subsection B of section 206 it was provided that process might be served upon an agent or officer of the carrier operating such railroad or system of transportation, if such agent or officer is authorized by law to be served with process in proceedings brought against such carrier, and if a contract had been made with such carrier by or through the President for the conduct of litigation arising out of the operation during Federal control. If no such contract had been made, process might be served upon such agent or officer as might be designated by the President.

The lower Court nowhere in its extensive remarks pretended that this section of the Transportation Act had been complied with either literally or substantially, but held that, in view of the decision of the Circuit Court of Appeals in the case of *Globe & Rutgers Fire Insurance Company* v. *Hines*, 273 Federal 774, the Director General of Railroads was before the Court as a legal entity, and that it was immaterial in what capacity he was sued, because he was subject generally to the jurisdiction of the Court to the same extent as a private natural person would be.

We respectfully submit that, in so holding, the District Judge exceeded his jurisdiction. It appears from the authorities cited in the preceding heading of this brief, that the Director General of Railroads is not a legal entity at all: he is merely the agent of the Government. The only legal entity is the United States. It is well settled by the decisions of this Court that the United States, being a sovereign, is never, without speci-

fic Congressional consent, subject generally to the jurisdiction of one of its own Courts.

In *Belknap* v. *Schild*, 161 U. S. 10, 16, this Court said:

> "The United States, however, like all sovereigns, cannot be impleaded in a judicial tribunal, except so far as they have consented to be sued. This doctrine has been affirmed by this court in cases too numerous to be cited; and was clearly stated by Mr. Justice Field, delivering judgment in the case of The Siren, as follows:
>
> 'It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy: the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings, at law or in equity, without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress.' "

It is believed that the District Court reasoned from a false premise when it assumed that because the Director General was before the Court in one capacity, the Court could give judg-

ment against the Director General for any wrong for which he, or the other servants of the United States engaged in transportation, might be guilty. This ruling is contrary to the decisions of this Court in the following cases:

In *Schillinger* v. *United States*, 155 U. S., 163, 166, Mr. Justice Brewer, speaking for the Court, said:

> "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases *and contingencies* in which the liability of the Government is submitted to the courts for judicial determination. *Beyond the letter of such consent, the courts may not go*, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the Government." (Italics ours.)

In *United States* v. *Gleason*, 124 U. S. 255, 258, the Court said:

> "The United States can be sued for such causes and in such courts only as they have by act of Congress permitted. Neither the Court of Claims nor this Court can hear and determine any claims against the United States, except in the cases, *and under the conditions, defined by Congress.*" (Italics ours.)

The sole question which the Court had before it in this case was:

> Had the United States been sued in the manner which Congress had permitted and under the conditions as defined by Congress?

It is respectfully submitted that when the Court failed to dismiss the action because the conditions prescribed by Congress as a prerequisite to suit had not been complied with, it exceeded its jurisdiction.

III.

The suit was not brought in the manner provided by Congress.

The conditions of the Transportation Act which the libellant failed to comply with are:

> A. No process was issued as provided by the Transportation Act; and
>
> B. The sole cause of action alleged in the libel was against the Director General of Railroads as operator of the Lehigh Valley Transportation System; yet when the Director General offered to show that there was no negligence on the part of the persons operating the Lehigh Valley Transportation System, the Court refused to permit this to be done, notwithstanding the fact that the Director General as operating the New Haven Company was not before the Court.

Since the decision in *Missouri Pacific Railroad Co.* v. *Ault*, *supra*, there should be no doubt that the various transportation systems which were operated by the Director General were operated as separate entities. This Court, in that case, said:

> "The President took over the physical properties, the transportation systems, and

placed them under a single directing head; but he took them over as entities and they were always dealt with as such. Bull. No. 4, p. 113." (256 U. S., 560.)

"It is this conception of a transportation system as an entity which dominates Sec. 10 of the act. The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs." (256 U. S., 560.)

The District Court's view was to the contrary. It held that, as the suit was an action *in personam* against the Director General, the Director General was but one eptity and was in any suit brought against him in any capacity answerable for the wrongs of any of his servants. We respectfully submit that he should have held that the Director General was answerable only for the wrongs of such of his servants as were employed in operating the particular transportation system mentioned in the libel.

In *Farr v. St. Louis Southwestern Ry. Co., et al.*, Arkansas, p. , 243 Southwestern Reporter, 800, it appears that a suit had been instituted against the St. Louis Southwestern Railway Company and Walker D. Hines, Director General, for the recovery of damages sustained by a shipment of sweet potatoes shipped from Magnolia, Arkansas, to Dallas, Texas. It was alleged that the shipper had delivered the potatoes to the Louisiana & Northwestern Railway Company at Magnolia, Arkansas, for shipment to Dallas, Texas. Process was issued and served on the Director General, operating the St. Louis Southwestern Railway Company, by delivering a

copy of the process to the agent of the company at Waldo, Arkansas. When the case came on for trial, the Trial Court instructed the jury that, before they could find a verdict against the Director General of Railroads, they must find that the damage occurred while the potatoes were on the line of the St. Louis Southwestern Railway Company. The Supreme Court of Arkansas sustained this ruling. The Court said:

> "We think the provision relating to service of process under General Order No. 50, dated October 28, 1918, indicates very clearly that the service of process in actions, suits, and proceedings against the Director General of Railroads shall be made in the same way as formerly made against the transportation entity he represents. In other words, to bring the Director General of a particular transportation corporation into court in this state, the same process must be resorted to necessary to bring the corporation itself into court. Under the process in the instant case the Director General of Railroads is in court only in his capacity as representative of the St. Louis Southwestern Railroad Company, and not as the representative of the Texas corporation bearing the same name."

See also *Cardwell* v. *Payne*, not yet reported, Appendix A annexed hereto.

The point which we are emphasizing now is strengthened by the fact that, at the time the suit was brought, the Director General of Railroads had ceased to function, and the suit was brought under the Transportation Act against the United States through an agent appointed pursuant to the terms of that Act for the purpose of defending suits against the United States.

Section 206, Transportation Act, February 28, 1920; and General Order No. 68, issued on February 24, 1920, by the Director General of Railroads. Clearly under such conditions the Court exceeded its powers when it attempted to take jurisdiction otherwise than in strict conformity with the letter of the Transportation Act of February 28th, 1920. This it did when it took cognizance of the suit after having had its attention called to the fact that no process had been served on either the Lehigh Valley Transportation Company or the New York, New Haven & Hartford Railroad Company, or on any agent of the President designated under the Act, and after its attention had been called to the fact that there had been no proof that any contract had been made by the President with the Lehigh Valley Transportation Company or with the New York, New Haven & Hartford Railroad Company for the conduct of litigation arising out of Federal control.

IV.

No right of action existed.

It appears from the language of subsection (a) of section 206 of the Transportation Act that permission to bring suit is limited to suits from the operation by the President of a railroad or system of transportation of any *carrier* where liability would have arisen under the provisions of the Federal Control Act or of the Act of August 29th, 1916. This Court in *The Western Maid*, 257 U. S. 419, held that a cause of action against the United States can only exist when the sovereign has so willed. We must refer to the Federal Control Act of March 21, 1918, which was in force November 7, 1919, when the collision in the present case occurred, to see what actions

Congress has permitted to be brought against the United States as a result of the operation of the railroads while under Federal control. Section ten of the Federal Control Act is as follows:

> "That carriers while under Federal control shall be subject to all laws and liabilities as *common carriers*, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such federal control or with any order of the President."

So far as we are aware, there is no provision of the Federal Control Act or of the Transportation Act of 1920 which creates any cause of action against the United States other than those specified in section 10 of the Federal Control Act. Clearly, the provisions of section 10 refer only to liabilities of common carriers. Liability for collision damage to a third party cannot be said to be a liability of a common carrier. Such a liability does not grow out of carriage or out of a contract of affreightment. It is a tort liability. This Court has held in many cases that it cannot be inferred that Congress intended to create causes of action against the United States in tort unless Congress has specifically granted such a right and remedy.

> *The Western Maid*, 257 U. S. 419;
> *Bigby* v. *United States*, 188 U. S. 400, 408.

The present case sounds only in tort and is therefore not such a case as was contemplated by the statute.

V.

This is a proper case for a writ of prohibition, because the District Court, in assuming jurisdiction both as against the Director General of Railroads as operating the Lehigh Valley Transportation Company, and as Director General of Railroads, as operating the New York, New Haven & Hartford Railroad Company, and in ignoring the fact that the suit was, in fact, a suit against the United States, which could only be brought in strict compliance of the rules laid down by Congress in the Transportation Act of 1920, obviously exceeded its jurisdiction.

Ex parte Indiana Transportation Company, 244 U. S. 450;
Sheppard v. *Adams*, 168 U. S. 618, 623.

Dated, March 3, 1923.

Respectfully submitted,

T. CATESBY JONES,
JAMES W. RYAN,
Proctors for Petitioner,
64 Wall Street,
New York City.

APPENDIX A.

The opinion (not yet reported) in *Cardwell* v. *Payne, Director General of Railroads*, of the Appellate Court of Illinois, through Mr. Justice Thomson, is, so far as material here, as follows:

> "However, the most serious error in this record has to do with the misjoinder of the defendants and the entering of a joint judgment against them. It is admitted that of the seven cars of hay involved in this case, the Michigan Central handled two and the Grand Trunk handled five; but it nowhere appears, nor is it claimed, that any or all of the cars were handled by both the Michigan Central and the Grand Trunk. If the Director General of Railroads, operating the Michigan Central, or the Federal Agent, is liable in damages to the plaintiff, by reason of the condition of the hay in the two cars handled by that road, it is by virtue of a contract entered into between the plaintiff and the representative of the Director General operating that railroad. If the Director General of Railroads operating the Grand Trunk, or the Federal Agent, is liable in damages to the plaintiff, by reason of the condition of the hay in the five cars handled by that road, it is by virtue of a contract entered into between the plaintiff and the representatives of the Director General operating that railroad. These two sets of contracts of carriage were, of course, entirely separate and not joint in any sense. It is elementary that one may not recover damages in the same action against different defendants, for the breach of separate contracts. *Sleeper* v. *Banquet Hall Company*, 116 Ill. 57. But the plain-

tiff contends that he brought his action against only one defendant, namely, the Director General of Railroads, and that this defendant was succeeded by the Federal Agent. He contends further that neither the Michigan Central nor the Grand Trunk were ever parties to this suit, for since the President took control of all railroads and appointed a Director General of railroads and later appointed a Federal Agent, the defense of this case has been at all stages in the hands of one person. This contention is not sound.

Section 10 of the Federal control act provided, 'that carriers while under Federal control, shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgment rendered as now provided by law.' In commenting on that section in *Missouri Pacific Ry.* v. *Ault*, 41 Sup. Ct. Rep. 593, the Supreme Court of the United States said:

'The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers which it enjoyed at the time the railroads were taken over by the President except in so far as such rights or remedies might interfere with the needs of federal operation. * * * The situation was analogous to that which would exist if there were a general receivership of each transportation system. * * * The courts were to go on entertaining suits and entering judgments under existing law, but the property in the hands of the Presi-

dent for war purposes was not to be disturbed. With that exception the substantial legal rights of persons having dealings with the carriers were not to be affected by the change of control. This purpose congress accomplished by providing that "carriers while under federal control" should remain subject to all then existing laws and liabilities and that they might sue and be sued as theretofore.'

The Court said further that the term 'carriers' as used in the Act meant the transportation systems as distinguished from the corporation owning or operating them; that the President took over the physical properties, the transportation systems, and placed them under a single directing head, that he took them over as entities and they were always dealt with as such; that each system was continued to be dealt with by itself; that it is this conception of a transportation system as an entity which dominates Section 10 of the Act; that they are dealt with as active responsible parties answerable for their own wrongs except that levy of execution upon their property was precluded as inconsistent with the Government's needs and that all doubt as to how suits should be brought was cleared away by General Order No. 50, which required that it be against the Director General by name.

In *Seaver* v. *Hines, Director General of Railroads*, 261 Fed. 239, the plaintiff contended that the government management and control of the railroads of the country was a war measure, and under the war powers of Congress, so far consolidated or merged the various railroads of the United States into one system as to create a situation which would make it reasonable and proper to have the Federal Court assume jurisdiction over a cause of action,

and a railroad management, foreign to the district where the suit was brought under service of process on agents of another railroad, who were within the district, which was such service as would not have been effective to that end prior to the assumption of federal control. In holding the contrary the Court pointed out that section 10 of the Federal Control Act provided that actions at law or suits in equity might be brought and judgment rendered 'as now provided by law.' The Court then said:

'But the position is taken by the plaintiff that, since the federal control of railroad transportation systems as effectuated by the orders of the Director General, causes of action are not prosecuted against the individual carriers, but against the Director General as the representative of all the systems operated by the government.

'This position is true in a fictional sense, but not in any general or substantial sense. It is only to be accepted in an exceptional sense. The order requiring suits to be brought against the Director General, and this without regard to the question whether the Director General had authority to make it, was based upon the idea that while government control exists as a war measure, the government is, in a certain sense, the owner of funds resulting from the operation of the lines, or at least in control of them, to be used to pay operating expenses and liabilities, subject ultimately to reasonable adjustment as between the government and the owners, and is responsible for the management of the various railroads, and therefore, as a matter of convenience and of reasonable precaution, might so far regulate court procedure as to require actions to be brought against the Director General. But this,

so far as concerns procedure, aside from the name, is in a very large sense, nominal, and it is against reason to contend that the purpose of such an order was, in a substantial sense, to consolidate and merge the various individual interests, or, in other words, the various individual railroads of the country into a single system, to the end that new remedies should be had and jurisdiction created upon a kind of service not theretofore known in legal or equitable procedure.'

While the issues involved in the cases cited were not such as the one involved here, in our opinion the observation of the Court referred to are applicable to the issue presented in the case at bar. The plaintiff may not prosecute separate causes of action, involving claims for damages growing out of separate contracts of carriage claimed to have been had with separate carriers, involving separate and distinct lots of goods in the same suit and recover a joint judgment and thus be placed in a position where he may recover against the Federal Director operating one carrier, or the Federal Agent, the full amount of damages resulting from the transportation of two or more separate shipments over different roads. The Director General operating the Michigan Central, or the Federal Agent, succeeding him, can only be liable for damages resulting from the shipment over the Michigan Central, and *the Director General operating the Grand Trunk, or the Federal Agent succeeding him, can only be liable for damages resulting from the shipment over the Grand Trunk.* The fact that the Director General or the Federal Agent is the same individual in both cases does not permit the prosecution of both actions in one suit and recovery of a joint judg-

ment. *The two causes of action are just as separate and distinct as they would have been had they arisen prior to federal control. Therefore, the joint judgment recovered in the case at bar cannot stand.*

For the foregoing reasons the judgment of the Municipal Court is reversed."

3

262-274

Office Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1922.

No. 27 ORIGINAL.

IN RE JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS,

Petitioner.

MEMORANDUM IN REPLY TO PETITIONER'S BRIEF.

I. The cases cited in Petitioner's Brief (pp. 50, 51) do not overrule or modify the authorities cited in our brief (pp. 40-42) to the principle that the District Court having general jurisdiction of the subject matter of the suit, which was a marine tort, *i. e.*, collision, which general jurisdiction was extended to suits against the United States "in proceedings in admiralty" under the Transportation Act, Sec. 206a, and having also jurisdiction to determine in the first instance whether the general appearance without reservation of the Director General in the suit gave the District Court jurisdiction over him—the remedy of the Director General to review the decision of the District Court was by appeal and not by writ of prohibition or mandamus. *Ex Parte New York No. 1*, 256 U. S. 490, three

libels *in rem*, two against the tug *Charlotte* and one against the tug *Henry Koerber, Jr.*, were filed in the United States District Court by the owners of canal boats to recover damages sustained while in tow of the tugs. The owners of the tugs filed answers to the libels and at the same time filed petitions under Admiralty Rule 59, setting up in each case that at the time of the respective disaster, the tugs were under charter by the owners to the Superintendent of Public Works of the State of New York, who had entered into the charters under authority reposed in him by an act of the Legislature of the State of New York (L. 1919, Ch. 264) and had the tugs under his operation, control and management. The Attorney General of the State of New York appeared specially in behalf of the State and of the Superintendent of Public Works, and filed a suggestion that the Court was without jurisdiction to proceed against the Superintendent of Public Works, for the reason that as appeared upon the face of the proceedings that they were suits against the State of New York, in which the State had not consented to be sued (256 U. S., at p. 496). This Court referring to the New York State statute above cited, stated that the Superintendent of Public Works was authorized to provide such facilities as in his judgment might be necessary for the towing of boats on the canals of the State, and that Sec. 47 of the Canal Law (Consol. Laws, 1909, p. 264) provides for actions in the Court of Claims for certain kinds of damages from the use or management of the canals; but in terms it is provided that this "shall not extend to claims arising from damages, resulting from the navi-

gation of the canals." This Court further stated (p. 496) that no relief was asked against the Superintendent individually; "the proceedings against him being strictly in his capacity as a public officer," and (p. 501) "the decrees would effect" him "in his official capacity and not otherwise." This Court said (p. 497):

> "That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given."

And accordingly, decided (p. 497):

> "The fact that the objection to the jurisdiction of the court below might be raised by an appeal from the final decree is not in all cases a valid objection to the issuance of a prohibition at the outset, *where a court of admiralty assumes to take cognizance of matters over which it has no lawful jurisdiction.*" (Italics ours.)

The extract last quoted, clearly distinguishes the authority from the instant case where it is conceded that under the Transportation Act of 1920, the consent of the United States to sue, was expressly given and therefore the Court did not assume "to take cognizance of matters over which it has no lawful jurisdiction" and the language of this Court (p. 503) which is quoted in Petitioner's Brief (pp. 50, 51) allowing the writ of prohibition to be issued is manifestly

inapplicable. *In Re Ex Parte New York No. 2,* 256 U. S. 503, differs only from *Ex Parte New York,* 256 U. S. 409 in that there the proceeding was *in rem* against a tug, which was the property of the State of New York, employed in the public service of the State for Governmental uses, and this Court decided (p. 593) that the principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process *in rem,* applied with even greater force to exempt public property of State used and employed for similar purposes, and upon the facts shown, the tug was exempt, and the prohibition should be issued. The difference between that case and the case at bar is so manifest that further comment is unnecessary. *The Western Maid,* 257 U. S. 419, cited on page 51 of Petitioner's Brief we have distinguished on page 39 of our main brief.

The suggestion (Pet. Brief, p. 51) that the writs should be issued so as to save large expenses uselessly incurred on a reference to prove the damages (from our experience these expenses are usually quite small), or to have the point of law involved thus decided summarily so as to determine other claims similarly situated—is without force under the authority of *Ex Parte Harding,* 219 U. S. 363, disapproving *In Re Winn,* 213 U. S. 458, 467.

II. The main argument for the writs advanced by the counsel for the Director General is that the damage claimant under the Transportation Act 1920 must establish and the Court must determine the liability of the Director General

in relation to the operation of the particular system of railroad transportation out of which the cause of action arose as "the more serious aspect for the Director General is that his normal accounting operations will be seriously disorganized" (Pet. Brief, p. 51), and the stress of this argument is based upon General Orders of the Director General regulating the conduct of litigation arising out of disputed claims or out of operations during Federal control, by the railroad companies' legal force; how the expenses of litigation shall be defrayed; the apportionment of the recoveries out of trust funds of the United States; and the standard form of contract in reference to this subject matter. (General Order No. 41, Pet. Brief, p. 52; Standard Form of Contract, id. p. 40; General Order No. 68 id. p. 51; Standard Form of Contract, id. p. 40; Report of Director General, id. p. 39.) These orders were manifestly mere matters of regulation to facilitate adjustments between the Government and the railroad companies, to which damage claimants were not parties and are not therefore bound. But upon familiar principles such regulations could neither add to or alter the law (*Morrill* v. *Jones*, 106 U. S. 466; *Tracy* v. *Swartwout*, 10 Peters, 80, 95). However desirable it may be for the Director General for his convenience that his normal accounting methods shall not be seriously disorganized, that situation does not justify a construction of the Transportation Act of 1920, to require litigants to prove or the court to determine which set of the servants of the Government in the employ of the one or the other system of railroad transportation, committed the negligence resulting in

the damage claim in view of the Act by which the United States has consented to be sued generally and it is provided by the Act (Sec. 206e) that the judgments and actions brought under the Act "shall be rendered against the agent designated by the President under Sec. 206a" without any words of limitation as agent of the particular system out of the operation of which the liability arose, and shall be promptly paid out of the revolving fund created by Section 210 of the Act generally. Section 206b which regulates that the process in a suit under the Transportation Act *may* be served upon the agent of the carrier operating a particular railroad or system of transportation if a contract has been made with such carrier for the conduct of litigation arising out of operation during Federal control, or if not upon such other agents or officers as may be designated by the President, is merely a matter of procedure, designed evidently so that the process may reach the proper channel for attention. Nor does Sec. 206c affect the matter as that simply provides that complaints for damage reparation touching the enforcement by the President during the period of Federal control of the rates, fares, etc. claimed to be unjust, may be filed with the Interstate Commission within one year after the termination of the Federal control.

In short, the winding up of the railroad administration under the plan of the Transportation Act of 1920, continues through (in the language of Chief Justice White in *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135, 148) "one control, one administration, one power for the accomplishment of the one purpose, the complete

possession by governmental authority to replace for the period provided the private ownership theretofore existing."

Moreover, considering the legislation on this subject of the Government liability during Federal control *in pari materia*, and bearing in mind that the term "carrier" in the Federal Control Act of March 21, 1918 (40 Stat. 451) meant the Government (*Missouri Pac. Ry.* v. *Ault*, 256 U. S. 554, 561), the following language of that Act is significant: "In any action at law or suit in equity against the carrier, no defense shall be made thereto, upon the ground that the carrier is an instrumentality or agency of the Federal Government."

Indeed the Director General expressly admits this in his brief (p. 42) *"In view of the fact that the real party respondent is the United States, the question whether the respondent is one entity or several is irrelevant."*

III. The United States having consented to be sued in an action brought against the agent designated as provided by the Act, Sec. 206a, and that agent by proctors duly authorized having consented without reservation to the order of May 25, 1920, making him a party to the suit "Walter T. Hines as Director General of Railroads as agent * * * with the same force and effect as if said Director General of Railroads had been originally made party in the suit" *generally* and not in relation to the operation of the system of any particular carrier, this voluntary act of the officer of the Government charged with the duty of carrying out the provisions of the Act, constituted a consent that he be regarded in Court in all capacities and for all purposes.

And this intention to be held liable generally is further shown by his failure throughout the cause to make any objection to the way he had been brought in as a party to the suit, and by his petition of intervention by which he affirmatively became an actor in the suit, for under the 56th Rule in Admiralty only a party can file such an intervening petition. His right by waiver in this particular not to insist upon separation of liability for accounting purposes was as complete as his right by voluntary appearance to waive service of process as shown under Point I of our main brief.

IV. We desire to direct attention to a mistake made by counsel for the Director General (Brief, p. 45). It is claimed because at the time of the collision in this case on November 7, 1919, the Transportation Act of February 28, 1920, had not been passed, the libellant's cause of action was under the Federal Control Act of March 21, 1918. If that be true, then practically no suits could be brought for causes of action growing out of Federal Control under the Transportation Act of February 28, 1920, for by its terms, Federal control ended on March 1, 1920.

Upon such mistaken premises there is built up an argument that under the Federal Control Act, the United States had not consented to be sued in tort, a contention which we have answered in our main brief (33-37).

On the other hand, counsel urges (Brief, p. 20) that "if the libellant had proved the allegation of the libel that the collision damages were caused by the negligence of the tug *Mahanoy* operated as a part of the Lehigh Valley Transportation Company's system under Federal con-

trol, *it could not be questioned that the interlocutory decree actually entered was proper." That proof the libellant made.*

The libel alleged in the fifth article (Petn. 81) that on November 7, 1919, libellant's drill scow was at anchor and while so lying at anchor the tug *Mahanoy* with a tow of barges arranged in tiers was so carelessly and negligently handled and navigated that she brought the middle tier of her tow into contact with the drill scow. The answer of the Director General (Petn. 103) denied the allegations of the fifth article, except as the same were thereinafter admitted or modified in the ninth article of the answer, which upon the trial counsel for the Director General said should be the tenth article of the answer (Petn. 189). In the last mentioned article, it was admitted that the tug *Mahanoy* brought her tow into collision with the drill (Petn. 112). Upon this admission of contact, conceded by counsel for the Director General (Petn. 191), the court held that there was *prima facie* proof of negligence. It is elementary that where a vessel in motion comes into collision with a motionless vessel, there is a presumption of fault on the part of the moving ship, and the burden of proof lies on her to exonerate herself from liability. *The Oregon,* 158 U. S. 186, 192, *The Clara Clarita,* 23 Wall. 1, 13, *The Virginia Ehrman,* 97 U. S. 309, 315. The last cited case is also an authority for the principle that where a tug has a vessel in tow she is responsible for negligently bringing her tow into collision with another vessel. These self-evident principles are only cited because of the misleading statement in the brief of our adversary (p. 46) that the operation of the tug

Mahanoy by the Director General did not under the Act of Congress create liability because the boats in her tow alone collided with the drill scow. The extract from *The J. P. Donaldson,* 167 U. S. 599, 603, is incomplete because it was followed by the statement that the tug would be liable upon proof of negligence, which is precisely the underlying ground of the cause of action set forth in the libel.

V. If peradventure this Court should finally conclude that the Director General is entitled to relief on this application, we pray that a writ of mandamus and not a writ of prohibition should issue. By mandamus the District Court could be required to vacate its order (Petn. 244) dismissing the libel and petition as against the Director General as Agent of the New York, New Haven & Hartford R. R. Co. upon the exceptions interposed by him (Petn. 169-177), and the Director General as Agent for the New York, New Haven & Hartford R. R. Co. having voluntarily appeared (Petn. 157-161) the District Court could be further directed to require the filing of an answer to the libel and petition, by him as Agent of the New York, New Haven & Hartford R. R. Company, and the District Court thereupon directed to receive and consider the testimony offered by the Director General to show no fault of negligence on the part of the *Mahanoy* (Petn. 226) and any testimony offered on behalf of the tug *Transfer No. 20,* to the end that the liability of the Director General in either capacity would be determined. In this connection our adversaries are mistaken in the statement that the libellant acquiesced in the exclusion of the evidence (Pet. Brief, p. 48) offered by the Director

General. On the contrary, the record shows that Mr. Alexander, of counsel for the libellant, said (Petn. 231): "I had hoped that Mr. Potter could bring both of the tugs in and that we could show that they were both in fault." If the writ of prohibition is granted, the libellant loses its claim of $60,000 damages, for under the provisions of the Transportation Act, Sec. 206a, no suit can be brought later than two years from the date of the passage of the act, which was February 28, 1920, and that time has long expired.

Respectfully submitted,

MARK ASH,
EDWARD ASH,
Of Counsel for New Jersey
Shipbuilding & Dredging Company.

262-274

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FILED
APR 14 1923
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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

No. 27 ORIGINAL

IN THE MATTER

of

The Petition of JAMES C. DAVIS, as Director General of Railroads, as agent, for a writ of prohibition and/or mandamus, against the HONORABLE LEARNED HAND, a Judge of the District Court of the United States for the Southern District of New York, and the other Judges and officers of said court.

BRIEF IN OPPOSITION TO THE PETITION

MARK ASH,
EDWARD ASH,
Proctors for
New Jersey Shipbuilding
& Dredging Company.

CHARLES WATSON RUSSELL, Printer

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In the Supreme Court of the United States

OCTOBER TERM, 1922.

No. 27 ORIGINAL.

IN RE JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS,

Petitioner.

BRIEF IN OPPOSITION TO THE PETITION.

STATEMENT OF THE CASE.

On February 19, 1920, the New Jersey Shipbuilding & Dredging Company (for brevity hereinafter called the libellant), filed in the District Court of the United States for the Southern District of New York, a libel *in rem* against the steamtug *Mahanoy*, to recover $60,000 for damages to its drill scow, sustained on November 7, 1919, through the negligence of the tug (set forth in detail Petn. 84-88*) in bringing the middle tier of her tow of loaded coal barges (Petn. 83) arranged in tiers on a long hawser, into collision with the drill scow, a part of a dredging plant which the libellant was operating in the performance of a contract with the United States of

*This and like references are to folios in the Petition or pages of the Return.

America in excavating a reef in the East River designated as the Clark Street area (Petn. 81) located about abreast of Old Slip, Borough of Manhattan, N. Y.

As appears by the records of the said District Court, no process against the said steamtug as prayed for in the libel (Petn. 90) was ever issued out of said District Court (Return 2).

Prior to the time of the collision before mentioned, the President had taken possession and control of the Lehigh Valley Railroad Company and its subsidiary, The Lehigh Valley Transportation Company, owner of the tug *Mahanoy*, with the other railroad systems of the country, pursuant to the proclamation of December 26, 1917, (40 Stat. 1733) under the Act of Congress of August 29, 1916, ch. 418 (39 Stat. 619, 645). The Lehigh Valley System, including the tug, was being operated through the Director General of Railroads under the Federal Control Act of March 21, 1918, ch. 25 (40 Stat. 451).

Shortly after the filing of the libel and on February 28, 1920, Congress passed the Transportation Act of 1920 (41 Stat. L. 56) by which the Federal control of the railroads ended on March 1, 1920, and the United States consented Sec. 206a that "proceedings in admiralty based on causes of action arising out of the possession, use or operation by the President of the railroad or system of transportation of any carrier * * * of such character as prior to Federal control could be brought against such carrier, may after the determination of Federal control be brought against an agent designated by the President for such purpose," and Sec. 206e that final judgments decrees * * * in * * * suits, pro-

ceedings * * * of the character above described rendered against the agent designated by the President under sub-division (a) shall be promptly paid out of the revolving fund created by Section 210."

On May 25, 1920, pursuant to Sec. 206d, an order (Petn. 94) was entered upon the consent of Harrington, Bigham & Englar, as proctors for Walker D. Hines, Director General of Railroads and agent, substituting him as Director General of Railroads and agent in place of the steamtug *Mahanoy,* with the same force and effect as if the Director General had been originally made party respondent in the suit (Petn. 96) and amending the libel by adding an additional article (ninth) (Petn. 97) alleging that the Lehigh Valley Railroad Company and the tug at the time in the libel mentioned "was in the possession, use and operation of the President and the United States Railroad Administration, acting through the said respondent, Walker D. Hines, as Director General of Railroads," and that pursuant to the provisions of Sec. 206 of the "Transportation Act, 1920" before referred to, the respondent, Walker D. Hines, as Director General of Railroads had been designated by the President, agent, against whom should be brought proceedings in admiralty based on causes of action arising out of the possession by the President of the railroad and system of transportation of any carrier under the provisions of the Federal Control Act or the Act of August 29, 1916, and that libellant's cause of action arose out of the possession, use and operation of the Lehigh Valley Railroad Company and its said steamtug by the President, acting through the Director

General of Railroads, and that the suit was brought against the latter in accordance with the provisions of the "Transportation Act."

On July 1st, 1920, there was filed in the District Court an answer (Petn. 100) to the amended libel by John Barton Payne, as successor to Walker D. Hines, Director General of Railroads, which was subscribed at the end thereof "Harrington, Bigham & Englar, proctors for respondent," (Petn. 120) and to which was appended an affidavit of verification (Petn. 121) by T. Catesby Jones, in which it was stated that he was a member of the firm of Harrington, Bigham & Englar, proctors for the respondent; that the reason the verification was made by him and not by the respondent was that respondent was not within the jurisdiction, but that the sources of his (deponent's) information and the grounds of his belief, were statements made by the respondent (Petn. 122). The answer admitted (Petn. 104, 105) the allegations of the first and second paragraphs of the ninth article of the amended libel above referred to (Petn. 97-99) except it denied the allegations in said article ninth that the tug was owned by the Lehigh Valley Railroad Company; the answer admitted the admiralty and maritime jurisdiction of the United States and of the said District Court (Petn. 105) and further affirmatively alleged (Petn. 118) as a separate defense, that the respondent was entitled to *limit his liability* to the value of the tug and its pending freight, and reserved *all his rights* to set up such limitation by a petition for limitation of liability, pursuant to the Federal Statutes if the respondent should be advised that such a proceeding was necessary.

The answer was endorsed: "United States District Court Southern District of New York. *New Jersey Shipbuilding & Dredging Company,* Libellant, v. *Walker D. Hines, Director General of Railroads, etc.,* Respondent. Original Answer to Amended Libel. Harrington, Bigham & Englar, proctors for respondent, 64 Wall Street, New York City. Filed July 1, 1920." (Ret. p. 4.)

On July 1st, 1920, simultaneously with the filing of the answer, the petitioner by Harrington, Bigham & Englar, his proctors, intervened in the said suit and filed in the District Court a petition (Petn. 124-153) under the then 59th (now 56th) Rule in Admiralty, as Director General of Railroads and agent for the Lehigh Valley Transportation Company, against himself as Director General of Railroads and agent for the New York, New Haven & Hartford Railroad Company operating its steamtug *Transfer No. 20,* charging that he, petitioner, in the latter capacity was liable for the collision and consequent damage (Petn. 151) alleged in the libel, due to the fault and neglect of the last mentioned tug in the petition set out at large, causing the collision (Petn. 145). The petition further alleged, among other things, that by certain Acts of Congress and proclamations of the President of the United States (Petn. 130) railroads and carriers, including the Lehigh Valley Transportation Company and the New York, New Haven & Hartford Railroad Company, were placed under the direction and control of the Director General of Railroads, who during all the times in said petition mentioned, was in charge of the operation and control of all the property of said two companies, including said steamtug *Mahanoy,* and

said steamtug *Transfer No. 20*, and that thereafter John Barton Payne was appointed Director General of Railroads as agent for both said companies, against whom actions at law might be brought based on causes of action arising out of the operation by the President under the provisions of the Federal Control Act of said railroads or systems of transportation. The petition further stated (Petn. 151) that all and singular the premises therein were true, and within the admiralty and maritime jurisdiction of the United States and of the said District Court.

The petition was subscribed, at the end thereof, "Harrington, Bigham & Englar, Proctors for Petitioner" (Petn. 153) and there was appended an affidavit of verification (Petn. 154) by T. Catesby Jones, in which he stated that he was a member of the firm of Harrington, Bigham & Englar "proctors for the respondent herein," and in form and in content precisely the same as his affidavit of verification to the answer as hereinbefore stated. The petition was endorsed as follows: "United States District Court Southern District of New York, *New Jersey Shipbuilding & Dredging Company*, Libellant v. *Walker D. Hines, as Director General of Railroads and agent*, Respondent. Petition. Harrington, Bigham & Englar, proctors for petitioner, 64 Wall Street, New York City. Filed July 1, 1920." (Ret. p. 6.)

On July 7th, 1920, there was filed in the suit in the District Court a notice of appearance (Petn. 157) by John Barton Payne, Director General of Railroads for the New York, New Haven & Hartford Railroad Company by Charles M. Sheafe, Jr., his proctor, and with it there were filed in the District by said Director General of

Railroads and agent, on account of *New Haven Transfer No. 20*, exceptions to the libel and his petition on account of the Lehigh Valley tug *Mahanoy*, praying that the libel and petition be dismissed upon the ground (Petn. 172) that at the time of the alleged collision on November 7, 1919, both tugs were solely under the control and management of and were being operated solely by Walker D. Hines, Director General of Railroads and for this reason no cause of action ever accrued to the said Director General of Railroads, operating the tug *Mahanoy* as against himself, operating the *Transfer No. 20*, or against John Barton Payne, his successor, and upon the further ground (Petn. 174) that under and pursuant to the Acts of Congress of August 29, 1916, March 21, 1918 and February 28, 1920, and the proclamations of the President issued thereunder, provision had been made for the payment by the United States of all judgments against the Director General of Railroads as agent, resulting from causes of action which arose out of the operation by the President of the railroads or systems of transportation under the statutes before mentioned, and that any decree for damages to which the original libellant might be entitled, would necessarily be satisfied out of a common fund belonging to the United States and either derived from the operation of said railroads, including the transportation systems of the Lehigh Valley Transportation Company and the New York, New Haven & Hartford Railroad Company, or out of the revolving fund or funds appropriated by the before mentioned Acts of Congress, and that therefore the petition of said

John Barton Payne was unauthorized and unwarranted by law.

On January 11th, 1922, this cause came on to be heard in regular order, together with two other causes, for damage growing out of the same collision (Petn. 179) brought by the W. J. Fee Coal Co. and the James McWilliams Blue Line (Petn. 178) against the Director General of Railroads, the parties libellant appearing by their respective proctors and Harrington, Bigham & Englar by Henry B. Potter for all respondents (Petn. 180, 181).

Before any testimony was taken, the Director General of Railroads as agent for the New York, New Haven & Hartford R. R. Co. by Charles M. Sheafe, Jr., proctor (represented by Edward R. Brumley) moved the District Court to sustain the exceptions above referred to, and the Court after hearing him in support of the exceptions and Harrington, Bigham & Englar (represented by Henry B. Potter) proctors for the Director General of Railroads as agent of the Lehigh Valley Transportation Company, in opposition, sustained the exceptions and dismissed the petition (Ret. pp. 7, 8) following the decision of the U. S. Circuit Court of Appeals for the Second Circuit in *Globe & Rutgers Fire Insurance Co.*, v. *Hines*, 273 Fed. 774, (Cert. Denied 257 U. S. 643) as more fully appears by the order entered in said District Court on January 11th, 1922 (Petn. 244-249).

The hearing of the cause then proceeded before the District Court and the parties libellant adduced their testimony in support of the claims set forth in their respective libels without the objection or plea to the jurisdiction on the part

of said Director General of Railroads represented by Harrington, Bigham & Englar, his proctors, through Henry B. Potter, aforesaid.

Upon the testimony thus taken, together with the facts alleged in the tenth article of the answer (Petn. 106, 113) of the Director General of Railroads, to the amended libel of the New Jersey Shipbuilding & Dredging Company (Petn. 101), the Court concluded and decided that the Director General of Railroads was liable for the damage caused to the drill scow of the New Jersey Shipbuilding & Dredging Company, and the consequent damage (Petn. 190, 191) and excluded proof offered by the proctor for the Director General of Railroads to establish that the collision and damage were not caused by any negligence on his part in the operation of the tug *Mahanoy,* but were wholly due to his fault and neglect in the operation of the tug *Transfer No. 20,* counsel last mentioned conceding that the *Transfer No. 20* was at the time of the collision part of the equipment of the New York, New Haven & Hartford Railroad Company in the possession and control of the Director General of Railroads (Petn. 227). The reasons for the decision of the Court were set out in the record (Petn. 226-229) and were in brief (Petn. 228) that the only respondent in the case was the Director General, who at the time was in control of both railroads in question and both tugs; that he was operating then a single system of common carriage by means of the equipment of both railroads, and that therefore it made no difference whether the negligence, which caused the injury was due to the crew of the *Mahanoy* or the crew of the New Haven boat; in either case

the injury was due to an agent of the Director General, who was a single carrier; that the libellant had been injured by one of two sets of servants concededly, and that would be enough to charge the common carrier with liability.

After this decision that the Director General was liable, having been given, it was then for the first time that Mr. Thompson, special counsel representing the Director General of Railroads, raised the objection to the jurisdiction of the Court to hear and determine the suit, on the ground that there had been no service upon the Director General, of process in the suit, as required by Subdiv. b. of Section 206 of the Act of Congress of February 28, 1920, known as "The Transportation Act, 1920" (Petn. 234), although he had voluntarily consented to being made a party to the suit and had entered an appearance by Harrington, Bigham & Englar, his proctors, and this appearance it was conceded (Petn. 237) was authorized, if the Director General might appear voluntarily by any attorney like any other party. The Court after hearing counsel fully on the point (Petn. 236) overruled the objection for the reasons appearing in the record (Petn. 237, 241) which were in brief that by section 206-b of the Act of Congress last mentioned, it seemed to the Court very obvious that the purpose of Congress (Petn. 239) was no more than to say that the Director General should be a party defendant by the same procedural method as any other individual becomes such, and that the Court was bound (Petn. 240) to give to the purpose of Congress, fair latitude, and when a Director General is subjected to service like an individual, it was to be assumed that the ordi-

nary methods of bringing him before the Court are available, both as to the parties and to him, if he wishes to avoid the purest of formalities and (Petn. 239) there certainly could be no conceivable purpose in supposing that the mere delivery of a piece of paper, like a monition, to one of the agents (designated in Section 206-b) was within the intent of Congress. The Court accordingly overruled the objection to the jurisdiction, and entered an interlocutory decree in favor of the libellant, New Jersey Shipbuilding & Dredging Company, for its damages sustained by reason of the collision, with an order of reference to a special commissioner to compute such damages, which decree was entered in the said District Court on February 18, 1922 (Petn. 250). No hearing before the commissioner has as yet been held.

As a matter of precaution and to safeguard the libellant, February 27, 1922, process in the suit was *actually* served upon the petitioner designated for that purpose by the President, by the Marshal of the District Court. (See Citation, Petn. 256-261 and Ret. p. 10.) The service was made within two years after the passage of the Transportation Act on February 28, 1920, as required by Section 206a thereof.

On March 6, 1922, the petitioner as agent, entered in the District Court notice of appearance in the suit by Bigham, Englar & Jones, his proctors. (Petn. 262, Ret. p. 11.)

THE GROUNDS UPON WHICH THE PETITIONER BASES HIS RIGHT FOR THE ISSUANCE OF THE WRIT.

These grounds are stated in the brief (pp. 6, 7) for petitioner as follows:

1. Could the Director General of Railroads authorize a voluntary appearance in an action purporting to be brought under the Transportation Act of 1920, when the provisions of such Act were not complied with?

2. Whether, in an action brought against the Director General of Railroads, as the operator of a particular transportation system, the Director General of Railroads can be held liable for torts committed by the servants and agents of another transportation system?

3. Whether, when Congress provided that the United States, after taking over the railroads, should be subject to all laws and liabilities of common carriers, there was any legal liability of the United States for injuries done persons whose claims did not arise out of a contract of carriage.

ARGUMENT.

I.

THE DISTRICT COURT OBTAINED JURISDICTION OF THE PERSON OF THE DIRECTOR GENERAL BY HIS VOLUNTARY APPEARANCE IN THE SUIT AND HIS AFFIRMATIVE ACTS IN THE PROGRESS OF THE CAUSE.

Upon the record, these facts stand undisputed.

The Director General by attorneys whose authority to act for him, has never been questioned throughout the course of the entire proceedings, *nor is now*, consented on May 25, 1920, to an order by the District Court amending the libel

against the tug *Mahanoy in rem* by substituting the Director General as a party *in personam* "with the same force and effect as if 'he' had been originally made a party respondent in said suit." (Petn. 96.) This consent order also added another article to the libel alleging the Federal possession, use and operation of the Lehigh Valley Railroad Company and the tug *Mahanoy* through the Director General and that the cause of action set forth in the libel arose out of such use and operation of the railroad and the tug, and that the suit was brought against the Director General under the provisions of the Transportation Act, 1920, Sec. 206.

Thereupon the Director General filed in the District Court an answer to the amended libel upon the merits, alleging facts and circumstances to show that the collision was solely due to the negligence of another tug *Transfer No. 20.* In addition, the Director General set up an affirmative separate defense that he was entitled *"to limit his liability"* (Petn. 118), to the value of the tug *Mahanoy* and its pending freight and "reserved all of *his* rights to set up *his* right of limitation," under the Federal statutes in respect thereto.

This answer contained no plea to the jurisdiction of the District Court of the person of the Director General, because he had not been served with process as provided in the "Transportation Act of 1920" Sec. 206 b. On the contrary, it contained the express admission by him (Petn. 105) of the jurisdiction of the District Court, which obviously included jurisdiction over him as a party respondent. This answer was subscribed by Harrington, Bigham & Englar as

"proctors for respondent" generally and not appearing specially, and was endorsed correspondingly (Petn. 119, Ret. p. 4). The answer was verified by one of these proctors who stated therein that the sources of his information and the grounds of his belief touching the same, were "statements made by the respondent" (Petn. 121, 123).

Moreover, the Director General as a party respondent intervened affirmatively in the original suit by filing a petition (Petn. 124-153) in which he set up the same facts and circumstances as alleged in his answer to show that the collision was solely due to the negligence of the tug *Transfer No. 20*, the property of the New York New Haven & Hartford R. R. Company, and that therefore he was not liable as Director General in the use and operation of the tug *Mahanoy*, the property of the Lehigh Valley Transportation Company, but that he liable as Director General in the use and operation of the tug *Transfer No. 20* of the New York, New Haven & Hartford R. R. Co. and therefore asked process against himself in the latter capacity, to the end that if any damages should be decreed to the libellant, the decree should be entered against him in his capacity in operating the New York, New Haven & Hartford R. R. Company, although he alleged (Petn. 131, 132) that he was at all the times mentioned "in charge of the operation and control of all the property" of both companies, including both the tugs.

Again, there was no allegation in the petition that the Director General was not properly proceeded against as an original party respondent to the suit, but on the contrary it was alleged

that he was (Petn. 132) "now acting as such in this District and as such within the jurisdiction of this honorable court" (referring to the District Court) and he further alleged (Petn. 151) "that all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court," once more admitting that the court had jurisdiction over his person.

This petition was also subscribed by Harrington, Bigham & Englar, "as proctors for petitioner" generally and not appearing specially and was endorsed correspondingly (Petn. 153, Ret. p. 6) and the petition was verified in precisely the same manner by one of these proctors as was the original answer before referred to (Petn. 154).

In the petitioner's brief (p. 3) it is stated that this petition was filed by the petitioner under the 56th Rule in Admiralty. Referring to this rule, it will be noted that only a claimant or respondent is entitled to bring in another person, who he claims is liable to the libellant by way of remedy over, contribution or otherwise, growing out of the same matter. Accordingly, when the Director General affirmatively intervened in the suit by this petition, he precluded himself from claiming that he was not a party to it properly within the jurisdiction of the District Court. It is certainly anomalous that having thus intervened and in his very petition invoked the jurisdiction of the District Court for his benefit, he can now question and reject that jurisdiction of his person for the reason that he was not served with process.

Regarding then these voluntary acts of the petitioner in consenting originally to be made a party respondent *in personam*, interposing a general answer on the merits, in which he admitted jurisdiction over his person, and affirmatively asserted the right to limit *his liability* to the value of the tug *Mahanoy* and to set up *his right* to limitation under the Federal law, his intervention in the original suit as a party to thrust the liability upon another, in which he again admitted the jurisdiction of the court over his person and invoked that jurisdiction in his behalf and his participation in the trial of the cause as above referred to in the statement of the case, it seems almost indisputable that *if he, petitioner were a private individual,* the Court obtained complete jurisdiction in the suit over his person.

> "Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause." Miller *J.* in *Cooper* v. *Reynolds,* 10 Wallace, 308, 321.
>
> "By appearing to the action, the defendants in the court below placed themselves precisely in the situation in which they would have stood, had process been served upon them, and consequently waived all objections to the non-service of process." Marshall, *Ch. J.* in *Pollard* v. *Dwight,* 4 Cranch, 421, 428.
>
> "The statement of the case, which we have given, shows that the defendants entered their appearance without reservation. If there could be any doubt upon the subject it is removed by their repeated subsequent recognitions of the fact. This made their position just what it would have been if they had been brought in regularly by the service of

process. In this aspect of the case all defects were cured and the jurisdiction of the court over their persons became complete." Swayne, *J.*, in *Atkins* v. *Fiber Disintegrating Co.*, 18 Wall. 272, 298.

"Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the Court to such irregularity. * * * It is only where he pleads to the merits in the first instance, without insisting upon the illegality that the objection is deemed to be waived." Field, *J.*, in *Harkness* v. *Hyde*, 98 U. S. 476, 479.

This principle that an individual by his voluntary appearance in a suit without reservation places himself in precisely the same position as if process had been served upon him, applies equally to the United States as a party.

As early as 1830, this Court in *Farrar & Brown* v. *The United States*, 3 Peters 459, was asked by the Attorney General of the United States to dismiss a writ of error to which the United States was a party upon the ground that the citation was returnable to a day out of term, but it appeared that according to the uniform practice of the Court, the Clerk entered at the first term to which any writ of error was returnable, the appearance of the attorney general in every case to which the United States was a party by entering his name on the docket. Chief Justice Marshall, writing for the Court, said:

"This practice must have been known to every Attorney-General, and has never been objected to. It might be considered, therefore, as having an implied acquiescence on

> the part of the Attorney-General, although it is admitted that there is no evidence of any express assent. We do not say that this practice would be conclusive against the Attorney-General if he should at the first term withdraw such appearance, or move to strike it out, in order to take advantage of any irregularity in the service of process. But if he lets it pass for that term, without objection, we think it is conclusive upon him as to an appearance.
>
> The decisions of this court have uniformly been that an appearance cures any defect in the service of process; and there is nothing to distinguish this case from the general doctrine. The cause therefore is ordered to be re-instated."

This general rule of practice applied in the case filed by this Court to the United States as a suitor, has never been questioned or modified, so far as we, after search, can discover in any later case in this Court or in the lower Federal Courts. On the contrary, the case has been followed quite recently by the United States Circuit Court of Appeals of the Second Circuit in *United States* v. *N. Y. & Oriental S. S. Co.*, 216 Fed. 61, in which the Court, in a suit against the United States under the Tucker Act (24 Stat. L. 505) which required that the suit be brought in the district where the plaintiff resides and it was begun in the Southern District of New York by the plaintiff which was a foreign corporation, and had its residence nowhere in the United States,—said (p. 69):

> "But we do not find it necessary to express any opinion upon that question. In our opinion if the provision which requires the plaintiff to bring suit in the district in which he

resides is applicable to non-resident aliens and to citizens residing abroad, nevertheless the requirement is a personal privilege which the law officers of the government may waive and in this case did waive by putting in a general appearance. In *Farrar & Brown* v. *United States*, 3 Pet. 459, Chief Justice Marshal held that the Attorney General of the United States by a general appearance cured any defect in the service of process on the United States, and that the general rule that such an appearance cured a defect in process was applicable to the United States as well as to any private litigant."

In *Pareis* v. *Payne, Director General*, Ward, *C. J.* sitting in the District Court (S. D.) in an opinion handed down January 29, 1923 (not officially reported) overruled an exception taken by the Director General at the trial for the first time to the jurisdiction of the court, urged on the ground that no monition had been served upon him as required by Section 206 of the Transportation Act, for the reason that he had prior to the trial, appeared generally and answered. This decision was made in an admiralty suit brought under the Act by the owner of a tug for injuries sustained by the negligent operation of the Director General during Federal control of a tug belonging to the Erie Ry. Co. colliding with the former tug.

It appearing that this rule of practice has been so universally assumed, the law should be deemed at rest.

In *Calton* v. *Bragg*, 15 East. 223, Lord Ellenborough said:

"It is not only upon decided cases, where the point has been passed upon but also

> from the continued practice of the court, without objection made, that we collect the rules of law."

In *Smith* v. *Doe*. 2 Brod. & B. 598, Lord Eldon said:

> "That the most enlightened judges who ever sat in Westminster Hall always gave the greatest weight to what had obtained in practice."

Is there anything in the Transportation Act which evinces the intent of Congress to change this universal rule of practice and *condition* the consent of the United States to be sued as provided by Section 206a upon the *actual* service of process upon the agent designated in Section 206 b, which condition could not be waived by the Director General by voluntary appearance. When regard is given to the Transportation Act as a whole, enacted as its title indicates "for the termination of Federal control of railroads and systems of transportation" (41 Stat. L. 456), it discloses a comprehensive scheme, with the aim and desire of the Government to return the systems as they were before Federal control, with broad adjustments and adequate settlements of conditions existing not only at the termination of the Government relation, but a "guaranty period" extending six months after such termination. (41 Stat. L. 464, Sec. 209a.)

As a part of the general plan, the United States fairly and squarely assumed liability for all "causes of action arising out of the possession, use or operation" of the railroad systems of any carrier during Federal control "of such a character as prior to such Federal control could have

been brought against such carrier," by waiving its immunity as a sovereign and consenting to be sued on such causes of action in every conceivable form, *i. e.*, "actions at law, suits in equity and proceedings in admiralty." Is it believable that having taken over this obligation in such all embracing language on the one hand, it intended to withdraw it on the other, if the highly technical and formal provision of Section 206b was not complied with by actual service of process in a suit brought to recover upon a cause of action specified in Section 206a of the Act? Is it not more believable that the requirement that "process *may* be served upon any agent" (Sec. 206b) read in connection with the previous provision that the suit was to be brought against an agent designated by the President for such purpose (Sec. 206a), was nothing more than a "procedural method" (to borrow the language employed by the Court below, Petn. 239) employed by Congress to give direct notice of the litigation to the officer of the Government specially appointed to take care of this particular part or branch of the work, which remained to be done at the termination of the Federal control? Our adversaries cling to the phrase in the Act "process may be served upon any agent" as if it were a fetich. The office of process is merely to bring a party into court. If he chooses to come in voluntarily into Court to meet the claim brought against him, how has he suffered? The record and the brief of our adversaries will be searched in vain for anything showing that the United States or its Director General of Railroads, its agent, lost any rights, or was deprived of any opportunity to fully defend, by

the omission of the mere handing to the Director General of process.

As the Court below said (Petn. 239):

> "It seems to me very obvious that the purpose of Congress was no more than to say that the Director General should be a party defendant by the same procedural method as any other individual becomes such. There certainly can be no conceivable purpose in supposing that the mere delivery of a piece of paper like a monition to one of these agents was within the intent of Congress, and so far as I can see, no difference whatever arises whether we assume that the Director General is allowed to appear as any other party respondent is allowed, or whether we insist that he be served with a monition."

It will be observed that Section 206 b states that "process *may* be served upon any agent."

In *Thompson* v. *Roe*, 22 How. 422, 434, speaking of the cases where the word "may" is construed in a statute to mean "must" it was said: "It is only where it is necessary to give effect to the clear policy and intention of the legislature that such a liberty can be taken with the plain words of a statute."

In *Minor* v. *The Mechanics Bank*, 1 Peters 46, 64, speaking of the rule in the construction of statutes where the word "may" is often construed as imperative, it was said: "Without question such a construction is proper in all cases where the Legislature meant to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject, further than that that exposition ought to be adopted in this, as in other

cases, which carries into effect the true intent and object of the Legislature in the enactment. *The ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions.*" (Italics ours.)

Moreover, when Congress enacted (Section 206a) that proceedings in admiralty might be brought against the United States upon the causes of action in question, it must be held that Congress knew what Mr. Justice Story said in *The Virgin*, 8 Pet. 538, 550, in speaking of the considerations which control courts sitting in admiralty: "Such courts in the exercise of their jurisdiction are not governed by the strict rules of the common law, but act upon enlarged principles of equity," and what Mr. Justice Curtis said in *Kellum* v. *Emerson*, 2 Curt. 79, 14 Fed. Cas. 263: "A court of admiralty applies the principles of equity to the subjects within its jurisdiction."

We have examined with care the cases cited by our adversaries in their brief. Nothing decided in any of them militates with our contentions under this point.

In *Belknap* v. *Schild*, 161 U. S. 10, there was no Act of Congress giving the consent of the United States to be sued. The case merely held that while the Government could be sued under certain acts of Congress, which were cited by a patentee for their use of his invention *under a contract* made with him by the United States or by their authorized officers, it could not be sued for an infringment of a patent, that being an action in tort, and the United States having

not consented to be liable in suits founded in tort.

In *Schillinger* v. *United States*, 155 U. S. 163, this court referring to the Acts of Congress which gave jurisdiction to the Court of Claims to entertain claims against the United States, the only point decided was that the Court of Claims under these acts had no jurisdiction of a claim for damages by a patentee based upon the use of a patented process in the construction of a pavement, as it was clear that the action sounded in tort.

In *United States* v. *Gleeson*, 124 U. S. 255, cited on page 13 of our adversaries' brief, the language there extracted must be read in connection with the point decided by the Court. Rev. Stat. U. S. Sec. 707 (now Jud. Code, Sec. 242, Comp. Stat. Sec. 1219) provides that an appeal to this court shall be allowed on behalf of the United States from all judgments of the Court of Claims adverse to the United States and in favor of the plaintiff, in any case where the amount in controversy exceeds $3,000. The Court of Claims, though adverse to the claimant on the merits, rendered judgment for $597.84 against the United States *pro forma* for the purpose of an appeal to this court upon a question because it would effect a class of cases. This court, however, held that as the effect of disposing of the case in this way, if allowed, would be to nullify the restriction upon appeals from the Court of Claims and to make this court a court of original, instead of appellate, jurisdiction. The case is, on the contrary in our favor, because Mr. Justice Gray said (p. 260):

"It is true that there are cases in the books, in which appeals from judgments of the Court of Claims, appearing to have been rendered *pro forma, but no objection being taken on that ground, have been considered and decided upon the merits (Citations). But in the case at bar the irregularity of the action of the Court of Claims has been objected to by the Attorney General in behalf of the United States, and cannot be passed over.*" (Italics ours.)

II.

IF THE COURT DID NOT GET JURISDICTION OF THE PERSON OF THE DIRECTOR-GENERAL BY HIS VOLUNTARY APPEARANCE AND HIS AFFIRMATIVE ACTIONS IN THE PROGRESS OF THE CAUSE, THEN IT DID OBTAIN SUCH JURISDICTION BY THE SUBSEQUENT ACTUAL SERVICE UPON HIM OF PROCESS IN THE SUIT.

To safeguard against the possibility of a decision on appeal that the District Court did not get jurisdiction of the person of the Director-General by his voluntary appearance and his participation in the cause, there was issued out of the District Court, process on February 27, 1922 by citation (Petn. 256, 261) according to the practice in admiralty, and this citation was actually served by the Marshal of the District on the Director-General in the manner provided by Sec.-b of the Transportation Act (Petn. 68) as appears by the return of the Marshal incorporated in the Return of the Court (Ret. p. 11).

On March 6, 1922 the petitioner entered in the District Court a general notice of appearance in the suit by Bigham, Englar & Jones, his proctors (Petn. 262, Ret. p. 11).

At the time of the issuing of the process and its actual service upon the petitioner, the suit was still pending in the District Court under the interlocutory decree entered in the District Court on February 18, 1922 (Petn. 250) referring it to a Special Commissioner to ascertain and compute the libellant's damages sustained by the collision, and no hearing has as yet been had before the Commissioner.

If then all that had taken place in the cause before, went for nought, then the District Court certainly obtained jurisdiction of the Director General by the compliance of the actual service of process upon him on February 27th, which was timely and within the two years after the passage of the Transportation Act on February 28, 1920 as required by Sec. 206-a, and the matter is now in course of litigation in the District Court on process actually served.

III.

UNDER THE TRANSPORTATION ACT, 1920, THE GENERAL APPEARANCE OF THE DIRECTOR GENERAL AS AGENT DESIGNATED UNDER THE ACT, GAVE THE COURT JURISDICTION OF THE SUBJECT MATTER TO DETERMINE THE GENERAL LIABILITY OF THE UNITED STATES IRRESPECTIVE OF WHETHER THE LIABILITY WAS INCURRED BY THE OPERATION OF ONE RAILROAD OR SYSTEM OF TRANSPORTATION OR ANOTHER.

A reading of the Act of Congress discloses that to hold the United States, suit must be brought against one party only, *i. e.*, the agent designated by the President for such purpose, and there is no requirement that he should be

sued in relation to the particular railroad out of the operation of which the cause of action arose. Final judgments were to be rendered against this agent designated by the President generally (Sec. 206 e) and not in any particular capacity as representing a distinct railroad, and were to be promptly paid out of the revolving fund created by Section 210.

Section 210 of the Act appropriated $300,000,000 as a revolving fund for payment of judgments generally before referred to, without segregating or separating the liability as arising out of the operation by the Director General of any specific railroad.

The Transportation Act in this regard was in harmony with prior legislation. Under the Federal Control Act, 40 Stat. 451, Sec. 10 as was said by this Court in *Missouri Pac. R. R. Co.* v. *Ault*, 256 U. S. 554, 561:

> "If the cause of action arose while the Government was operating the system 'the carrier while under Federal control' was nevertheless to be liable and suable. This means as a matter of law that the Government or its agency for operation could be sued for under the existing law, the legal person in control of the carrier was responsible for its acts. The title by which suit should be brought—the person who should be named as defendant was not designated in the act. * * * All doubt as to how suit should be brought was cleared away by General Order No. 50, which required that it be against the Director General by name."

It will be noted, by reference to order No. 50 (Petn. 61) that the action should be "brought

against William G. McAdoo, Director General of Railroads and not otherwise," generally and not in the relation of any particular railroad he was operating. When Congress enacted the Transportation Act, it reincorporated virtually Order No. 50 by providing (Sec. 206a) that the person who should be named as defendant should be the agent designated by the President. In the language of the Court in *Globe & Rutgers Fire Insurance Co.* v. *Hines*, 273 Fed. 774, 780 (Cert. Denied, 257 U. S. 643):

> "It seems to us that the result of all this was that the railroad properties within the continental United States, while Federal control lasted, were organized into a unified national system of transportation under a single head, the Director General of Railroads."

In *Missouri Pac. R. R. Co.* v. *Ault, supra*, this court said (256 U. S. at p. 557):

> "The Railroad Administration established by the President in December, 1917, did not exercise its control through supervision of the owner companies, but by means of Director General through 'one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing."

adopting the language of Chief Justice White in *Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, 148.

Whatever may have been said by this Court in *Missouri Pac. R. R. Co.* v. *Ault*, 256 U. S. 560, that the President under the Federal Con-

trol Act took over the physical properties as entities, does not affect the jurisdiction of the District Court to adjudge liability against the United States by judgment against the Director General as agent, for the court also said in the case last cited (p. 561), that although levy or execution on the property of a railroad was precluded as inconsistent with the government's needs, "the liability of the transportation system was to be enforced by allowing suit to be brought against whomever, as the party operating the same was legally responsible under existing law, *although it be the Government,*" from which, it seems to us, that the latter's responsibility arose from the operation and possession generally, and irrespective of the entity of the particular transportation system, operated by the Government.

But even if this were not so, the Transportation Act of 1920 fixes the liability of the Government operating all the systems of transportation as a whole, for this Court decided in the *Ault* case that the corporations owning a railroad are not liable for any of the acts of the Director General of Railroads during the time of Federal control, as during that time, the corporations were completely separated from the control and management of their railroad systems.

There is nothing to be found in the Transportation Act of 1920 by which any railroad corporation is liable to the United States by way of remedy over, contribution, or otherwise, for a liability growing out of the operation of the railroad system by the Director General during Federal control. But on the contrary, as we have before stated, the Government assumes the

liability and agrees to pay out of the revolving funds provided by Section 210 of the Act and the earlier revolving fund of $500,000,000 appropriated by Section 6 of the Federal Control Act.

Opposite counsel in contending (Brief p. 15) that the Director General was answerable only for the wrongs of such of his servants as were employed in operating the particular transportation system mentioned in the libel, refer to what was said by this court in the *Ault* case (256 U. S. 560) as follows:

> "The systems (of transportation) are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs."

We submit that while this may have been true of the operation of the Government under the Federal Control Act Sec. 10, it is not so touching the plan of general liability provided and accepted by Congress in the Transportation Act.

But the language just quoted from the *Ault* case, in another view, is not applicable in the instant case. It would be if the tug *Mahanoy* had collided with the *Transfer No. 20,* or *vice versa,* causing injury to either vessel while being operated by the Director General of Railroads. In that event, of course, the Director General could not have sued himself to recover for the damage to the injured vessel by the negligence of the other vessel, for the same reason that if two ships are owned by the same person, he would not be liable to himself.

Phoenix Ins. Co. v. *Erie Transp. Co.*, 117 U. S. 312, 322;
Simpson v. *Thompson*, 3 Aspinall (N. S.) 567.

It is upon that ground that the Circuit Court of Appeals for the Second Circuit in *Globe & Rutgers Fire Insurance Co.* v. *Walker D. Hines, as Director General*, 273 Fed. 774 held that an underwriter insuring a float of the Central Railroad of New Jersey on behalf of the Director General of Railroads as operator of the vessel, could not sue by subrogation the Director General as operator of a tug of the New York Central Railroad Company for damages caused by the negligent collision of the tug with the float, saying (p. 777): "It is elementary that the same person cannot be both plaintiff and defendant at the same time in the same action. * * * And the rule has been applied where the same person sues and defends in different capacities."

IV.

THE TRANSPORTATION ACT, 1920, SEC. 206A INCLUDES CAUSES OF ACTION SOUNDING IN TORT ARISING OUT OF NEGLIGENCE IN THE OPERATION BY THE DIRECTOR GENERAL OF TRANSPORTATION SYSTEMS CAUSING INJURY TO THE PROPERTY AND PERSON OF THIRD PARTIES.

Our learned opponents in a page and a half of their brief (17, 18) seemingly raise seriously the contention that the United States is not liable under the Transportation Act for liabilities growing out of torts committed in the operation

of the transportation systems during Federal control. This contention if sustained by this Court will certainly have startling results. As before referred to, this Court has held in *Missouri Pacific R. R. Co.* v. *Ault*, 256 U. S. 554 that the carriers owning a railroad are not liable for any of the acts of the Director General of Railroads in the operation of the roads during Federal control. That being so, if third parties suffering injury in person or property through the negligence of the Director General in such operation, cannot hold the United States under the Transportation Act for the resulting damages, they will be remediless.

Although it is a matter of common knowledge that during the four years of Federal control there must have been incalculable damage running up, no doubt, to millions of dollars, done to the property or person or third parties, by negligence in the operation of the transportation systems of this entire country by the Government over land or by water, and while the Director General has been sued for such negligence in countless actions sounding in tort by third parties, and recoveries adjudged by all the courts everywhere, this is the first time, as far as we can discover, that counsel have had the temerity to raise the question that this Government was not liable for negligence causing such damages, as the same constituted a tort. It is noteworthy that this point was not raised in the Court below, by the same counsel who now appear for the petitioner, and that it has taken nearly fifteen months since the trial of the case in the court below on January 11th, 1922, for such counsel to discover the grounds for this contention.

Opposite counsel ignoring the plain, natural, ordinary meaning of the language of Section 206a which denotes that the United States assumed liability and consented to be sued on all causes of action arising out of the government's operation of such character as prior thereto could be brought against the "carrier" (which word was used as it is understood in common speech, meaning the transportation systems as distinguished from the corporations owning or operating them *Missouri Pac. R. Co.* v. *Ault*, 256 U. S. 559, 560) and seizing on the words in parentheses in Section 206a "under the provisions of the Federal Control Act or of the Act of August 29, 1916" (which plainly were inserted for reference to denote the source of statutory authority under which the government functioned) urge "that permission to bring suit is limited to suits from the operation by the President of a railroad or system of transportation of any carrier where liability would have arisen under the provisions of the Federal Control Act or the Act of August 29, 1916." (Pet. brief p. 17.)

A sufficient answer to this contention is that Sec. 206a gives the consent of the United States to be sued upon any cause of action of such character "*as prior to Federal control*" and not "*during*" Federal control could be brought against the carrier.

But even if, as contended Section 10 of the Federal Control Act is to be regarded, that does not alter or affect the liability of the United States under Section 206a.

Section 10 states that carriers while under Federal control are subject "to all laws and

liabilities as common carriers, whether arising under State or Federal laws or at common law."

Apart from rights and liabilities as common carriers, it is hornbook law that railroad corporations are bound to conduct their business with a care and skill commensurate with its dangerous character, *without any special legislation on the subject* and their liability for injuries to person or property *in the absence of such legislation* is governed by the common law of negligence (23 Amer. & Eng. Encyc. of Law, 2nd Ed. 729) and of course, a claim for negligence sounds in tort.

The word "liabilities" used in the phrase "subject to all laws and liabilities as common carriers" in Section 10, has been defined to include responsibilities for torts, as well as for breach of contract.

> *McElfresh* v. *Kirkendall,* 36 Iowa 225;
> *Miller & Lux* v. *Kern Co. Land Co.,* 134 Cal. 586;
> *Price* v. *Parker,* 197 Mass. 1 .

In *Missouri Pac. R. R. Co.* v. *Ault,* this court, referring to above Section 10, said (256 U. S. 554, 559):

> "The plain purpose of the above provision was to preserve to the general public the rights and remedies against common carriers, which it enjoyed at the time the railroads were taken over by the President, except in so far as such rights or remedies might interfere with the needs of Federal operation * * * (p. 561). If the cause of action arose while the Government was operating the system the 'carrier while under Federal control' was nevertheless to be liable and suable. This means as a matter of law

that the Government or its agency for operation could be sued, for under the existing law the legal person in control of the carrier was responsible for its acts." * * *

"The Government undertook as carrier to observe all existing laws; it undertook to compensate any person injured through a departure by its agents or servants from their duty under such law." (P. 563.)

In *Darr* v. *Davis* (258 U. S. 421, 428) agent designated by the President under Section 206 of the Transportation Act, it was said by this court (p.):

"It was definitely held in *Missouri Pac. R. R. Co.* v. *Ault*, 256 U. S. 554, that, at all the times here involved, Section 10 of the Federal Control Act permitted the Government through its Director General of Railroads to be sued for any injury negligently caused on any line of the railway in his custody precisely as a common carrier corporation operating such road might have been sued and that recovery, if any, would be from the United States. Thus plainly, the petitioner had the right to sue the Director General of Railroads for negligently injuring him, and if successful his recovery must have been from the United States * * * (p.). The right to sue the United States under the Federal Control Act applicable to all persons alike, is on the basis of negligence precisely as if the Government were an operating common carrier corporation, and it is subject to all of the expense, delay and hazard usual in cases of that character."

In *North Carolina R. Co.* v. *Lee*, 43 Sup. 3, the action was for negligence causing death of an

employee of a railroad operated by the Director General under the Federal Control Act. It was alleged by the administratrix of the deceased that the road was under a lease to the Southern Railway and that the lessee's negligence in operation caused the injury, but only the lessor was made defendant, its liability being asserted under a local rule in North Carolina, by which a railroad corporation is liable for injuries resulting from a lessee's negligence in operation, and so the lower court held, although the defendant set up the fact that the railroad was being operated solely by the Director General as before. This Court reversed and decided that under the *Ault* case, the Director General alone was made subject by Section 10 of the Federal Control Act to "the liabilities as common carriers whether arising under State or Federal laws or at common law, as the Government operated the railroad not as lessee, but under a right in the nature of eminent domain."

It seems to us entirely clear that under the three cases in this court, which we have last cited, it was held that under Section 10 of the Federal Control Act, the United States was liable for causes of action arising in tort.

In *Hines, Agent* v. *Sangstad S. S. Co.* (C. C. A. 1st) 266 Fed. 502, the Director General was sued by the owner and charterer of the steamer *Sangstad* sustained through the negligence out of an apparatus belonging to the Boston & Maine R. R. which was under the control of the Director General of Railroads, and was operated by his agents and servants in discharging the vessel's cargo on the dock. The question was squarely presented and decided by the court

that under Section 10 of the Federal Control Act actions are not limited only to such as arise out of a breach of some duty imposed upon the carrier as a common carrier.

To the same effect is *Friesen* v. *Chicago Ry. & P. Ry. Co.* (D. C. Nebraska) 254 Fed. 875, 878.

Space forbids a reference to the many other decisions in the lower Federal courts and the state courts, to the effect that the United States is liable in causes of action arising in tort for negligence. Some typical ones are cited.

Rutherford v. *Union Pac. Ry. Co.*, 254 Fed. 880;
Mardis v. *Hines*, 258 Fed. 945, aff'd 267 Fed. 171;
Hatcher & Snyder v. *Atchison T. & S. F. Ry. Co.*, 258 Fed. 952;
Haubert v. *Baltimore & Ohio R. Co.*, 259 Fed. 361;
Nash v. *Southern Pacific Co.*, 260 Fed. 280;
Smith v. *Babcock & Wilcox Co.*, 260 Fed. 679;
Westbrook v. *The Director General of Railroads*, 263 Fed. 211;
Erie Ry. Co. v. *Caldwell*, 264 Fed. 947;
Mardis v. *Hines*, 267 Fed. 171;
Dir. Genl. v. *Reynolds*, 268 F. 948;
Dir. Genl. v. *Zanziger*, 269 F. 552;
Hines v. *Smith*, 270 F. 132;
Hines v. *Hoover*, 271 Fed. 645;
Hines v. *Kountis*, 272 Fed. 105;
Gordon Fireproof Warehouse & Van Co. v. *Hines*, 272 Fed. 604;
Nedema v. *Hines*, 273 Fed. 252;

Dir. Genl. v. *Shotwell*, 273 Fed. 806;
Galehouse v. *Baltimore & O. R. Co.*, 27
Fed. 370;
Begert v. *Payne*, 274 Fed. 784;
Waldron v. *Payne*, 277 Fed. 802;
Beckham v. *Hines*, 279 Fed. 241;
Dir. Genl. v. *Blevins*, 280 Fed. 310.

The Government moreover acknowledged it
liability for causes of action arising out of to
during Federal control, through its properly a
credited representative.

By General Order No. 50 of the Director Ge
eral of Railroads promulgated October 28, 191
it was provided that actions at law, suits i
equity, brought in any court based on contra
binding on the Director General of Railroad
claim for death or injury to person or for los
and damage to property arising since Decembe
31, 1917 and growing out of the possession, us
control or operation of any railroad or syste
of transportation by the Director General o
Railroads, which action, suit or proceeding bu
for Federal control might have been brough
against the carrier company, shall be brough
against William G. McAdoo, Director Gener
of Railroads and not otherwise.

This interpretation of the law regulating Fe
eral control by the department of the Gover
ment, charged with the duty of executing th
same is regarded with great weight by th
courts.

United States v. *Cerecedo Hermanos*
Compania, 209 U. S. 338;
United States v. *Healey*, 160 U. S. 13
Robertson v. *Downing*, 127 U. S. 607.

The two cases cited in petitioner's brief of the *Western Maid,* 257 U. S. 419 and *Bigbie* v. *United States,* 188 U. S. 400 on this point (Pet. brief p. 18) are clearly distinguishable.

In *The Western Maid, supra,* all the vessels involved were either owned by the United States absolutely or *pro hac vice* (*i. e.,* chartered from private owners) and operated by the War and Navy Departments, and not as merchant vessels. This court decided that the United States had not consented to be sued for the torts of vessels so operated, and that the Act of Congress of September 7, 1916, Chapt. 451, Sec. 9, known as the Shipping Act, 39 Stat. 728, did not create a liability on the part of the United States nor was such a liability created by the Act of March 9, 1920, Ch. 95, Section 4.

Bigbie v. *United States, supra,* merely held that a person, who while properly in a government building sustains injuries by the fall of an elevator belonging to the government and operated by one of its employees, could not sustain an action against the United States to recover damages for such injuries as the suit is necessarily one sounding in tort, and not therefore maintainable against the United States. The rule of law enunciated has no application to the instant case if as we have shown under the Transportation Act of 1920 and the Federal Control Act, which is in harmony with it, the United States has consented to be sued for causes of action growing out of injuries to person or property through the operation of the transportation systems by the Director General of Railroads.

V.

NEITHER PROHIBITION NOR MANDAMUS WILL ISSUE WHERE THE AGGRIEVED PARTY HAS ADEQUATE REMEDY BY APPEAL.

Writs of prohibition are issued to the district courts only in cases of admiralty and maritime jurisdiction. (Jud. Code Sec. 234, Comp. Stat. Sec. 1211.)

Ex parte Graham, 10 Wall 541-2-3;
Ex parte Easton, 95 U. S. 68-72;
In re Massachusetts, 197 U. S. 482-488;
Ex parte Christy, 3 Howard 292, 322.

In other cases, mandamus is the remedy.

Ex parte Roe, 234 U. S. 70.

But neither remedy will issue in any case to control the judicial discretion of the District Court, to compel it to decide a question within its jurisdiction in any particular way, to serve the purpose of an appeal or writ of error for the correction of errors or irregularities in its proceedings, or to review its judgment on the facts or the law in case in which it has power to pass upon the same.

Smith v. *Whitney*, 116 U. S. 167, 176;
Ex parte Penn., 109 U. S. 174;
In re Atlantic City R. Co., 164 U. S. 633;
In re Huguley Mfg. Co., 184 U. S. 297, 301;
In re N. Y. & Porto Rico S. Co., 155 U. S. 523;
In re Morrison, 147 U. S. 14, 26;
In re Ex parte Roe, 234 U. S. 70;
In re Chicago R. I. & P. Ry. Co., 255 U. S. 273.

It is well settled that the District Court had jurisdiction to determine in the first instance whether the general appearance of the Director General in the suit had the same effect as if he had been brought in regularly by the service of process under Section 206 b of the Transportation Act of 1920, and it is also well settled that its decision was directly reviewable by this Court under Judicial Code Sec. 238 (Comp. Stat. Sec. 1215).

Shepard v. *Adams*, 168 U. S. 618;
The Jefferson, 215 U. S. 130;
Merriam Co. v. *Saalfield*, 241 U. S. 22;
In re Chicago P. I. & P. Ry. Co., 255 U. S. 273.

It is unquestioned that the District Court had also general jurisdiction of the subject matter of the suit which was a marine tort, *i. e.*, collision on navigable waters (Libel, Petn. 76) under Judicial Code, Sec. 24, clause 3, and Sec. 256, clause 3 (Comp. Stat., Sec. 991, 1233) which general jurisdiction was extended to suits against the United States by Congress under the Transportation Act 1920 before referred to, growing out of causes of action arising from this operation of the railroads during Federal control.

This general jurisdiction of the District Court "in proceedings in admiralty" (Transp. Act, Sec. 206a) as to the subject matter of the suit, was not disputed by counsel for the Director General in the Court below but admitted in the answer and petition of intervention of the Director General (Petn. 105, 151).

Touching the subject matter, the question presented for decision as we have discussed under

the second point, was one of law involving the construction of the Acts of Congress and proclamations of the President and especially the Transportation Act of 1920, to determine whether in a suit brought under Sec. 206a of the latter Act against the Director General as Agent, he was responsible to a third party suffering injury to property, through his negligent operation, irrespective of whether the negligence was committed by his servants employed in operating one particular transportation system or the other.

Whether the ruling of the District Court on this question was "right or wrong it was a judicial act, done in the exercise of a jurisdiction conferred by law, and even if erroneous, was not void or open to collateral attack, but only subject to correction in an appropriate appellate proceeding. * * * The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal." Van Devanter, *J.* in *Ex Parte Roe*, 234 U. S. 70, 34 S. 722.

Conclusion.

It is but proper to state that while this suit was defended in the Court below *in form* by the Director General as Agent, the *real* contesting parties behind him, were two sets of underwriters, one which had insured the tug *Mahanoy*, and the other tug *Transfer No. 20*

against the liability for collision and suit. This appeared on the trial from the "Discussion" and "Statement by Mr. Thompson, for the Director General," noted in the record (Petn. 232, 233), but which were not taken down by the stenographer. It was sought to establish the respective liability for the collision of either the one tug or the other, to the end that the loss might be adjusted, but the Court declined to take it up unless the matter was put in the form of an independent arbitration, "so that the underwriters can be concluded", This appears clearly from the remarks of the Court on page 78 of the record of the Petitioner.

And this, it is fair to presume is what is attempted by the present belated application for writ of prohibition and mandamus.

Respectfully submitted,

MARK ASH,
EDWARD ASH,
Proctors for Libellant, New Jersey
Shipbuilding & Dredging Co.

FILED
APR 25 1923
WM. R. STANSBURY
CLERK

262-274

In the Supreme Court of the United States

OCTOBER TERM, 1922.

No. 27 ORIGINAL

IN RE JAMES C. DAVIS, DIRECTER GENERAL OF RAILROADS,

Petitioner.

PROTEST AND OBJECTION TO SUBMISSION BY PETITIONER AFTER THE CAUSE HAD BEEN ARGUED AND SUBMITTED TO THIS COURT, OF HIS AFFIDAVIT OF APRIL 17TH, 1923.

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States.

The New Jersey Shipbuilding & Dredging Company hereby respectfully enters its protest and objection to the improper practice of counsel for the petitioner in appending to their reply brief, an affidavit of the Director General made after the cause had been submitted to this Court. The permission granted by the Court, as we understood, to the petitioner to submit a reply brief, was limited to answering matter in the brief in opposition, which was not covered by the main brief of the petitioner.

This reply brief of the petitioner was received at 11:00 A. M. of this day, and lack of time prevents the printing of this objection, but if the Court directs through its Clerk that it should be printed, that request will be promptly complied with.

It is proper to note that there is an incorrect statement in the affidavit (Pet. Reply Brief, pp. 21, 22) touching the exception to the District Court exercising jurisdiction over the Director General and agent by virtue of the original libel or by virtue of the impleading petition, as agent operating the New York, New Haven & Hartford R. R. system, on the ground that the libellant had not complied with the conditions precedent to suit under Transportation Act, Sec. 206 against the agent operating the New York, New Haven & Hartford R. R. system. No such exception was raised as appears from the record (pp. 57-59). Moreover, the Director General, as agent of the New York, New Haven & Hartford R. R. Company voluntarily entered a general appearance, as appears by the record (pp. 53, 54).

A copy of this objection has been served on counsel for the Director General.

Dated, New York, April 19, 1923.

MARK ASH,
EDWARD ASH,
Of Counsel for the New Jersey Shipbuilding & Dredging Co.

262-274

FILED
APR 19
WM. R. STA

United States Supreme Court,

OCTOBER TERM—1922.

No. 27 Original.

In the Matter

—of—

The Petition of JAMES C. DAVIS, Director General of Railroads,

—against—

HONORABLE LEARNED HAND and the other Judges of the District Court of the United States for the Southern District of New York, for a Writ of Prohibition and/or Mandamus.

REPLY BRIEF OF THE DIRECTOR GENERAL OF RAILROADS IN SUPPORT OF THE PETITION.

T. CATESBY JONES,
EVAN SHELBY, *Regional Counsel.*
D. ROGER ENGLAR,
JAMES W. RYAN,
Proctors for Petitioner.

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United States Supreme Court,

OCTOBER TERM—1922.

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In the Matter

—of—

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—against—

HONORABLE LEARNED HAND and the other Judges of the District Court of the United States for the Southern District of New York, for a Writ of Prohibition and/or Mandamus.

REPLY BRIEF OF THE DIRECTOR GENERAL OF RAILROADS IN SUPPORT OF THE PETITION.

This brief is filed by leave of the Court granted at the oral argument.

I.

No appearance has been entered for James C. Davis, generally or as agent operating the New York, New Haven & Hartford Railroad System.

Mr. Justice Brandeis asked at the oral argument whether the consent of "Harrington, Bigham & Englar, proctors for respondent" to the entry of the order amending the libel (Record, p. 32) was an appearance on be-

half of the Director General of Railroads as Agent for the purpose of defending a cause of action arising from the operation under Federal control of the New York, New Haven & Hartford Railroad System. We respectfully submit that that consent was not an appearance on behalf of the Director General of Railroads as to all the railroad systems in the United States under Federal control or as to any railroad system under Federal control other than the Lehigh Valley Transportation System; and that a review of the subsequent pleadings demonstrates that neither the libellant, the District Court, nor any of the parties so practically construed it.

At the outset it should be noted that after the filing of the order on May 25, 1920, amending the libel, and before the filing on June 29, 1920, of the answer, Walker D. Hines ceased to be "Director General of Railroads and Agent". His resignation became effective May 18th, 1920 (p. 2, Govt. Document No. 160, 67th Congress, 2nd Session, H. of R., Report of Director General of Railroads for period from March 1, 1920 to December 31, 1921). His successor was John Barton Payne, "who was appointed effective May 18, 1920, and whose resignation took effect March 28, 1921" (p. 2, Govt. Document No. 160, *supra*). No order substituting John Barton Payne as Director General of Railroads and Agent or otherwise, as respondent, has ever been entered. On March 28, 1921, James C. Davis was appointed and qualified as Director General of Railroads under Section 206 of the Transportation Act (p. 2, Govt. Document No. 160, *supra*). On January 11, 1922, the cause was tried under the title of "*The New Jersey Shipbuilding and Dredging Company* v. *Tug Mahanoy*" (Record, p. 60, Minutes of Trial). On February 18, 1922, an interlocutory decree (Record, pp. 84-85) was entered ordering "that James C. Davis, now Director General and Agent as aforesaid, be substi-

tuted as respondent in place and stead of said Walker D. Hines, formerly said Director General and said agent, without prejudice to any of the proceedings heretofore had in the cause." This order and decree was not consented to (see Record, p. 85). The substitution of James C. Davis "now Director General as agent" shows that the libellant realized that there was no respondent before the Court, because Walker D. Hines, as Director General of Railroads, had ceased to exist, and no process had been issued against James C. Davis, as Director General and Agent, or appearance entered on his behalf. Nor was any appearance entered at the trial for James C. Davis generally or as Agent operating the New York, New Haven & Hartford Railroad System. Nevertheless, the libellant in that situation had an interlocutory decree entered "that the libellant herein recover against the respondent, James C. Davis, as Director General and Agent, as aforesaid" (Record, p. 85). Counsel for the libellant, then apparently believing that there was no respondent against whom the decree could be enforced, had a citation or process issued on February 28, 1922 against "James C. Davis, Director General of Railroads as Agent (Lehigh Valley Transportation Company)" (Record, p. 86). On March 6, 1922, the firm of Bigham, Englar & Jones appeared as proctors for respondent in the newly entitled cause of "New Jersey Shipbuilding & Dredging Company, libellant, against James C. Davis, Agent (Lehigh Valley Transportation Company)" (Record, p. 88). Therefore, the respondent against whom the interlocutory decree (Record, p. 84) is directed has never been served with process or appeared by counsel otherwise than as "James C. Davis, Director General of Railroads (Lehigh Valley Transportation Company)." Even if the consent to the order amending the libel (Record, p. 32) be regarded as a general appearance by Harring-

ton, Bigham & Englar on behalf of "Walker D. Hines, as Director General of Railroads and Agent" that appearance became null and void when "Walker D. Hines, as Director General of Railroads and Agent" ceased to exist prior to the trial and prior to the entry of the interlocutory decree. If the respondent dies or otherwise ceases to exist as a legal entity, the mere fact that counsel may have appeared generally for him during his life will not prevent the suit from abating on his death; nor will such appearance justify a trial of the cause after his death, and before the appointment or substitution of his successor; nor the entry, without appearance or consent, of an interlocutory decree against his successor.

The subsequent proceedings show that all the parties regarded the appearance of Harrington, Bigham & Englar, by consenting to the order amending the libel (Record, p. 32), as limited to an appearance for "Walker D. Hines, as Director General of Railroads and Agent" operating the Lehigh Valley Transportation Company.

The answer reads:

> "The answer of John Barton Payne, successor to Walker D. Hines, Director General of Railroads, as Agent for the Lehigh Valley Transportation Company, to the amended libel and complaint of the New Jersey Shipbuilding & Dredging Company against Walker D. Hines, as Director General of Railroads and Agent" (Record, p. 34).
>
> * * * * * * *

The petition under Admiralty Rule 56 reads:

> "The libel and petition of John Barton Payne, successor to Walker D. Hines, Director General of Railroads, as Agent for the Lehigh Valley Transportation Company, against John Barton Payne, Director General of Railroads, as Agent

for the New York, New Haven & Hartford Railroad Company" (Record, p. 42).

* * * * * * *

The notice of appearance by Charles M. Sheafe, Jr., on behalf of the Director General of Railroads as Agent for the New York, New Haven & Hartford Railroad Company reads:

"New Jersey Shipbuilding & Dredging Company,
Libellant,

—against—

Walker D. Hines, as Director General of Railroads and Agent (Lehigh Valley Transportation Company),
Respondent,

and

John Barton Payne, Director General of Railroads as Agent for The New York, New Haven and Hartford Railroad Company,
Respondent-Impleaded.

Sirs:

PLEASE TAKE NOTICE that the respondent, John Barton Payne, Director General of Railroads, as Agent for the New York, New Haven & Hartford Railroad Company, impleaded under the 59th Rule, appears in the above entitled proceedings and that I am retained as proctor for him therein and demand that a copy of all papers in this proceeding be served on me at my office in the Grand Central Terminal, Borough of Manhattan, City of New York.

Dated, New York City, July 6, 1920.

Yours, etc.,

CHARLES M. SHEAFE, JR.,
Proctor for Respondent-Impleaded.

To:

HARRINGTON, BIGHAM & ENGLAR, Esqs.,
Proctors for Petitioner."

(Record, pp. 53-54.)

* * * * * * *

The notice of motion to dismiss reads:

"New Jersey Shipbuilding & Dredging Company, Libellant,

—against—

Walker D. Hines, Director General and Agent of the United States Railroad Administration on account of the Lehigh Valley Tug 'Mahanoy,'

Respondent,

and

Walker D. Hines, Director General and Agent of the United States Railroad Administration on account of the New Haven Transfer No. 20,

Respondent,

* * * Signed Charles M. Sheafe, Jr., Proctor for Respondent."

(Record, pp. 55-56.)

* * * * * * *

The bill of exceptions reads:

"New Jersey Shipbuilding & Dredging Company, Libellant,

—against—

Walker D. Hines, Director General and Agent of the United States Railroad Administration on account of the Lehigh Valley Tug 'Mahanoy,'

Respondent,

and

Walker D. Hines, Director General and Agent of the United States Railroad Administration on account of the New Haven 'Transfer No. 20,'

Respondent,

* * * Charles M. Sheafe, Jr., Proctor for Respondent, John Barton Payne, as successor, etc."

(Record, pp. 57-59.)

* * * * * * *

The minutes of the trial before the District Court read:

> "The New Jersey Shipbuilding and Dredging Company against Tug 'Mahanoy'" (Record, p. 60).
> * * * * * * *

The minutes show that three cases were tried together but that there was no order consolidating them for trial. The respondents in the two other suits tried at the same time, but not consolidated with the present suit, designate the respondent as "Director General of Railroads (Lehigh Valley Railroad Company)," (Record, p. 60).

The order sustaining the exceptions and dismissing "Walker D. Hines, Director General of Railroads (New York, New Haven & Hartford Railroad) from the suit reads:

> "New Jersey Shipbuilding & Dredging Company,
> Libellant,
> —against—
> Walker D. Hines, as Director General of Railroads, and Agent (Lehigh Valley Transportation Company),
> Respondent,
> and
> Walker D. Hines, Director General of Railroads, as Agent (New York, New Haven & Hartford Railroad),
> Respondent-Impleaded."
> (Record, pp. 82-83.)
> * * * * * * * *

The interlocutory decree, prepared by counsel who are representing the libellant at the present hearing, reads:

> "This cause, which was originally brought against Walker D. Hines, Director General of

> Railroads, as agent under Section 206 of the Transportation Act, 1920, for a cause of action arising out of the operation of the steamtug 'Mahanoy' by the Director General of Railroads (which steamtug was owned by the Lehigh Valley Transportation Company)" etc. (Record, pp. 84-85).

The citation or process, also requested by counsel now representing the libellant, reads:

> "Whereas, a libel was filed in the District Court of the United States of America for the Southern District of New York, on February 19th, 1920, by the New Jersey Shipbuilding & Dredging Company, Libellant, against Walker D. Hines, Director General of Railroads (Lehigh Valley Transportation Company); and Whereas said libel was amended by substituting James C. Davis, Director General of Railroads, as Agent (Lehigh Valley Transportation Company) in the place and stead of Walker D. Hines, as Director General of Railroads as aforesaid, * * * we do hereby command you * * * to cite * * * the said respondent * * * to be and appear before the said District Court" (Record, pp. 86-87).

The notice of appearance reads:

> "New Jersey Shipbuilding & Dredging Company,
> Libellant,
>
> —against—
>
> James C. Davis, Agent (Lehigh Valley Transportation Company),
> Respondent."
>
> (Record, p. 88.)

It would seem to be clear from these pleadings and proceedings that even if the consent of Harrington, Bigham & Englar to the entry of the order amending the libel (Record, p. 32) was a general appearance on

behalf of "Walker D. Hines, as Director General of Railroads and Agent," the libellant by not objecting to the notice of appearance of Charles M. Sheafe, Jr. (Record, pp. 53-54) or to the order which was entered just before the trial (Record, pp. 82-83) dismissing "Walker D. Hines, Director General of Railroads, as Agent (New York, New Haven & Hartford Railroad)" from the suit, waived any right it may have had to regard Harrington, Bigham & Englar as proctors for the Director General of Railroads, as Agent operating the New Haven system. *United States* v. *Oregon*, 259 U. S. ; 43 Sup. Ct. Rep. 100, 102.

The return of the Marshal shows that the process which was issued after the entry of the interlocutory decree was served "upon the within named respondent, James C. Davis, Director General of Railroads, as Agent (Lehigh Valley Transportation Company) by exhibiting to Mr. German as designated agent of Lehigh Valley Transportation Company, at 143 Liberty Street, New York City, the within original" (p. 11, Return of the District Court).

Where it is doubtful in what capacity a party sues or is sued "a reference may be had to the whole pleading to determine the question" (31 Cyc. 100). The ninth paragraph of the amended libel reads in part as follows:

> "Libellant's cause of action arises out of the possession, use or operation of the Lehigh Valley Railroad and its steamtug 'Mahanoy' as aforesaid, by the President, acting through the Director General of Railroads, and this suit is brought against the latter in conformity with the provisions of said 'Transportation Act'" (Record, pp. 32-33).

We think it clear from this that the libel must be taken as alleging only a cause of action against the

Director General of Railroads, as Agent operating "the Lehigh Valley Railroad and its steamtug 'Mahanoy'." Moreover, this is the practical construction adopted by the libellant and all other parties, including the District Court, during the course of the proceding as to the capacity in which the Director General was sued under the libel. Such practical construction by the parties and the Trial Court should be adopted by this Court.

In view of the fact that Mr. Charles M. Sheafe, Jr., formally entered a notice of appearance in the proceeding on behalf of the Director General of Railroads, as Agent operating the New York, New Haven & Hartford Railroad system, the libellant cannot suggest that it was misled or prejudiced by a belief that the consent to the order amending the libel (Record, p. 32) constituted an appearance by Harrington, Bigham & Englar, on behalf of the New Haven system under Federal control. "Admissions or allegations made inconsiderately, by mistake or inadvertence, or in ignorance of the facts, will not operate as an estoppel where no prejudice has resulted, and may be withdrawn or repudiated unless the ignorance was the result of gross negligence * * *. Where the real fact was within the knowledge of the adverse party the rule is especially applicable" (31 Cyc. 90). Certainly James C. Davis, as Director General of Railroads and Agent is not estopped by a pleading or appearance of counsel for the predecessor, Walker D. Hines, of his own predecessor, John Barton Payne.

The appearance of Harrington, Bigham & Englar, could have no more effect than service of process on that firm or on an agent or officer in the operating department of the Lehigh Valley Transportation System, under Federal control, because that firm, in fact, represented only the Lehigh Valley Transportation System

under Federal control, and the Lehigh Valley Transportation Company (see *Hartog* v. *Hines*, 190 App. Div. (N. Y.) 640; Petitioner's Brief, p. 30). This clearly appears from the affidavit of James C. Davis, Director General of Railroads, submitted herewith as Appendix A of this brief. Only a pleader and his privies are bound by the allegations and admissions of a pleading (31 Cyc. 91). Nominal defendants cannot, by their admissions, bind the real defendants.

In *Citizens' Bank* v. *Brooks*, 23 Fed. 21, it was held that in an action in a Circuit Court on a judgment obtained in another State, the record of appearance of attorneys of the court for the defendant is not conclusive upon him and he may show that they had no authority to act in his behalf. The libellant had no right to maintain the amended libel, if it be regarded as against the Director General of Railroads, as Agent, operating the New Haven system, because it had not served process on an Agent of that system and had not obtained an appearance by counsel who were in fact representing that system under Federal control. In *Person* v. *Standard Life and Accident Insurance Company*, 92 Fed. 1022 (C. C. A.), the Court held that a fatal defect in the beginning of an action so that by the record it appeared that the plaintiff had no right to sue the defendant on the particular cause of action, was not cured by a general appearance or by the filing of a special demurrer not going to the jurisdiction. It is well settled that "where the Court is one of limited jurisdiction the complaint must affirmatively show that the case is within the jurisdiction" (31 Cyc. 104). The District Court had only a limited jurisdiction over the Director General of Railroads because he was in fact the Agent of the President of the United States. One of the conditions precedent to maintaining the libellant's

suit is that it show that either process was served on the Director General personally or on an Agent or officer of the New Haven system under Federal control. The libellant has not fulfilled this condition, because he has not and cannot show that Harrington, Bigham & Englar represented the Director General of Railroads, as Agent, operating the New Haven system. Consequently, that firm had no authority to waive the service of process on an Agent of the New Haven system under Federal control, which is a condition precedent to suit under Section 206 of the Transportation Act, 1920.

Moreover, it is respectfully submitted that under Section 206 of the Transportation Act of 1920 the Director General of Railroads, James C. Davis, as Agent of the President under that section cannot be sued otherwise than as representing a particular carrier system, that section requiring that a cause of action against a particular carrier system be set forth in the libel. At least the only way that such a result could be obtained under that section would be by specifically alleging causes of action against each and every carrier system under Federal control by name in the libel. Therefore, if the consent to the order amending the libel (Record, p. 32) be regarded as a general appearance on behalf of "Walker D. Hines, as Director General of Railroads and Agent" with reference to all carriers under Federal control or without reference to any particular carrier under Federal control, such general appearance was on behalf of a non-existent legal entity and was a nullity.

The substitution by the order amending the libel of "Walker D. Hines, as Director General of Railroads and Agent" was merely indicated in "the title, the first paragraph and the prayer herein" (Record, p. 32). It is well settled that "The character in which a party sues must be determined from the body of the pleading and

not from the description given in the caption, and where there is a wrong description or no description in the title, the error will be deemed merely formal. A substantial description is sufficient. Where one sues or is sued in a representative capacity it must be averred that it is as such representative, and a mere statement of the representative character following the name of the party will be treated as only *descriptio personae*. So where the pleadings disclose a cause of action by or against a person in his individual capacity, superadded words such as "Agent", "Executor", "Trustee", etc., should be rejected as *descriptio personae*. In actions by or against officers, the individual name, as well as the name of the office should be used (31 Cyc. 99). It is apparent from a reading of the body of the libel, particularly of paragraph 9, that "Walker D. Hines, as Director General of Railroads and Agent" is sued only in his capacity as operator "of the Lehigh Valley Railroad and its steamtug 'Mahanoy' as aforesaid by the President acting through the Director General of Railroads" (Record, p. 33).

We also suggest that the Director General of Railroads is a mere name invented by President Wilson. *Muir* v. *Louisville & N. R. Co.*, 247 Fed. 888. The Act of August 29th, 1916, authorized the President, acting through the Secretary of War, to assume possession and control of transportation systems in time of war. The President, desiring to assume possession and control not through the Secretary of War, but through the Secretary of the Treasury, appointed the Secretary of the Treasury, Mr. William G. McAdoo, as "Director General of Railroads". The term Director General of Railroads, so far as we have been able to ascertain, is not mentioned in the Act of August 29th, 1916, the Federal Control Act of March 21st, 1918, or the Transportation Act of February 28th, 1920. The statutory designation is of an "Agent" to be appointed by the President. Congress did not intend that the Director

General of Railroads in his official capacity should be an entity distinct from the United States, but it did intend that liabilities of the United States should only arise in respect of the operation of a particular carrier system, and that, unless the United States were sued in respect of such liabilities in the manner provided by the Transportation Act, no suit could be maintained. As a matter of economics, accounting and practical Government administration, it would be impossible to comply with the directions of Congress and at the same time defend litigation on any theory other than that each system was independent of the others so far as the relations between private third parties and the transportation systems under Federal control were concerned. The fact that so far as their relations with the United States were concerned the various transportation systems were only one physical or legal entity has no bearing on the fact that Congress intended by the Transportation Act and the Federal Control Act that liabilities of a particular transportation system under Federal control should be enforced during and after Federal control only in the same courts and in the same manner that such suits could be maintained against that particular carrier system prior to Federal control.

II.

This is a proper case for a writ of prohibition.

As stated at the oral argument, James C. Davis, the Director General of Railroads and Agent under Section 206 of the Transportation Act, has personally authorized us to ask a decision of this Court on the main question argued by us in our briefs because the pendency of a very large number of suits in Federal

and State Courts all over the United States involving this question is interfering with the prompt liquidation of the Railroad Administration's litigation. One of Mr. Davis' assistants, in charge of Railroad Administration litigation, estimated, in Mr. Davis' presence, that the pending suits involving that question total about one thousand. Mr. Davis has also personally authorized us to say to this Court that the precedent established by the decision of the District Court in this case is resulting in a serious disorganization of the normal accounting operations of the Railroad Administration. He has further authorized us to say that a decision adverse to our contention on the main issue would nullify the benefits which he has obtained for the Government by the contracts entered into pursuant to the direction of Congress in the Transportation Act with the various carrier companies. (See General Order No. 41, U. S. Railroad Administration Bulletin No. 4 Revised.) Under these contracts the expense of defending litigation arising from Federal control of a carrier system is borne, without reimbursement, by the company owning such carrier system, and the defense is conducted by its legal staff, subject merely to the supervision of the General Solicitor of the Railroad Administration. (See Standard Form of Contract in Bulletin No. 4, Revised, of U. S. Railroad Administration.)

The Director General of Railroads also wishes us to emphasize that throughout Federal control the integrity of each system of transportation was maintained. He wishes us again to call to the attention of the Court General Order No. 50 (Bulletin No. 4, United States Railroad Administration, p. 335), where it is said:

> "It is therefore ordered, that actions at law, suits in equity, and proceedings in admiralty hereafter brought in any court based on contract, binding upon the Director General of Railroads,

claim for death or injury to person, or for loss and damage to property, arising since December 31, 1917, and growing out of the possession, use, control or operation of any railroad or system of transportation by the Director General of Railroads, which action, suit, or proceeding but for Federal control might have been brought against the carrier company, shall be brought against William G. McAdoo, Director General of Railroads, and not otherwise; provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties, and forfeitures.

Subject to the provisions of General Orders numbered 18, 18-A and 26, heretofore issued by the Director General of Railroads, *service of process in any such action, suit or proceeding may be made upon operating officials operating for the Director General of Railroads, the railroad or other carrier in respect of which the cause of action arises in the same way as service was heretofore made upon like operating officials for such railroad or other carrier company.*"

The office of the United States Railroad Administration was conducted on this plan, and, when the Transportation Act of 1920 was before Congress, the plan was embodied in that Act. Hence the elaborate provisions contained in Section 206 of the Transportation Act merely described in detail the plan which had been adopted by the Railroad Administration to preserve the integrity of each Transportation System.

It is respectfully suggested that under these circumstances the District Court had no power to enter a decree which in effect nullifies a plan devised by Congress for the liquidation of the United States Railroad Administration. Particularly is this so where the officer charged with the practical administration of the plan and statute has so extensively put the plan into actual operation as seriously to embarrass the Government if the plan should at this late date be interfered with by the Courts.

Under these circumstances we respectfully submit and urge that this case should not be permitted to run its slow course to a final decree, because, as suggested in *Ex parte New York No. 1*, 256 U. S. 490, 503, the result will be "inevitably futile." See also *The Western Maid*, 257 U. S. 419, 434.

CONCLUSION.

To illustrate the urgency of a final decision by this Court of the questions here involved, we submit herewith, as Appendix B of this brief, a copy of an opinion of the Court of Appeals of the District of Columbia in the case of *Whalen Paper & Pulp Mills* v. *Davis*, delivered within the last week and received by the Director General of Railroads this morning. That Court has held that if a contract has been entered into between the Director General of Railroads and the company owning the particular carrier system for the conduct of litigation arising from Federal operation of that system, *a suitor cannot sue or serve the Director General of Railroads personally or generally.* If followed, this decision would determine the present case because the libellant here can recover only on the theory that it is suing the Director General personally or generally; but it has not shown that no contract was entered into between the Director General of Railroads and the New York, New Haven & Hartford Railroad Company and/or the Lehigh Valley Transportation Company for the conduct of litigation arising from Federal control of those systems. Indeed, the fact is, although not disclosed by the Record, that such contracts were entered into with both of those railroad companies.

Dated, April 17, 1923.

Respectfully submitted,

T. CATESBY JONES,
EVAN SHELBY, *Regional Counsel.*
D. ROGER ENGLAR,
JAMES W. RYAN,
Proctors for Petitioner.

Appendix A.

IN THE
SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM—1922.

No. 27 Original.

In the Matter

of

The Petition of JAMES C. DAVIS, Director General of Railroads,

—against—

HONORABLE LEARNED HAND and the other Judges of the District Court of the United States for the Southern District of New York for a Writ of Prohibition and/or Mandamus.

United States of America,
District of Columbia—ss.:

JAMES C. DAVIS, first being duly sworn, deposes and says:

He is, and since the 28th day of March, 1921, has been, the Director General of Railroads, and the Agent appointed by the President of the United States under the provisions of Section 206 of the Transportation Act of February 28, 1920, for the purpose of defending suits against the United States arising from the operation of

the various railroad systems while under Federal control.

Prior to and ever since January, 1920, the law firm of Messrs. Harrington, Bigham & Englar (and, since January 1, 1922, its successor, Messrs. Bigham, Englar & Jones), has been and now is the local counsel in maritime matters for the New York District of the Lehigh Valley Transportation System under Federal control, and has also been such counsel for the Lehigh Valley Transportation Company, a corporation, in matters not arising from the operation of that system under Federal control. Neither of said firms of Messrs. Harrington, Bigham & Englar, or Messrs. Bigham, Englar & Jones has ever been authorized by me, or by any of my predecessors, or by any of my assistants, to represent me in any capacity other than as Agent of the President of the United States operating the Lehigh Valley Transportation System and/or the New York Central Railroad System under Federal control, or as Agent of the President of the United States under Section 206 of the Transportation Act of February 28, 1920, for the sole purpose of defending suits arising from the operation under Federal control of the Lehigh Valley Transportation System and/or the New York Central Railroad System. Neither of said firms has ever been authorized to represent me or any of my predecessors in any matter arising from the operation of the New York, New Haven & Hartford Railroad System under Federal control or otherwise, excepting that they were specially retained to represent me in that capacity in eight certain suits commenced by libellants, Cornell Steamboat Company, T. Sanford Ross, Inc., City of New York, Union Ferry Company, Sunset Lighterage Company, Milady Underwear Company, and Nathan Becker & Sons, none of which relates in any way to the collision or litigation here involved. Nor has either of said firms ever been authorized by me or any

of my predecessors to represent me or any of them personally or generally in any matter.

Mr. Charles M. Sheafe, Jr., who during all the times here involved was the local counsel at New York for the New York, New Haven & Hartford Railroad Company, a corporation, is the only counsel who since January, 1919, has represented my predecessors in office and myself for the New York District as Director General of Railroads operating the New York, New Haven & Hartford Railroad System and/or as Agent of the President under Section 206 of the Transportation Act of 1920 for the purpose of defending litigation arising from Federal control of that system. Said Charles M. Sheafe, Jr., appearing for my predecessor, John Barton Payne, in said capacity as Agent of the President operating the New York, New Haven & Hartford Railroad System, was authorized by my said predecessor, John Barton Payne to appear in such capacity, and on July 6, 1920, entered an appearance for my predecessor, John Barton Payne, in the suit commenced in the District Court of the United States for the Southern District of New York on February 19, 1920 (as amended by order of May 25, 1920), by the New Jersey Shipbuilding & Dredging Company against me as Agent operating the Lehigh Valley Transportation Company's System in which my predecessor, John Barton Payne, had been impleaded as Agent operating the New York, New Haven & Hartford Railroad System by Petition under Admiralty Rule 56 requiring my said predecessor in such capacity to answer both the impleading petition and the original libel. Mr. Sheafe excepted to the District Court's exercising jurisdiction over my said predecessor, as Director General and Agent, either by virtue of the original libel or by virtue of the impleading petition, as Agent operating the New York, New Haven & Hartford Railroad System, on the

ground that the libellant had not complied with the conditions precedent to suit under Section 206 of the Transportation Act of 1920 against the Agent operating the New York, New Haven & Hartford Railroad System. The District Court sustained such exceptions, and John Barton Payne, in capacity as Agent operating the New York, New Haven & Hartford Railroad System, was, by order of said Court, dismissed as an interested party either under the original libel or the impleading petition.

Dated, April 17, 1923.

JAMES C. DAVIS.

Subscribed and sworn to before me this
17th day of April, 1923.

W. B. ROBINSON,
Notary Public.
My commission expires March 23, 1925.
(Notarial Seal)

Appendix B.

COURT OF APPEALS DISTRICT OF COLUMBIA.

Opinion Filed April 3, 1923.

WHALEN PAPER & PULP MILLS, LTD., a corporation,
Appellant,

—against—

JAMES C. DAVIS, Director General of Railroads and Agent of the President,
Appellee.

Sheet No. 3904.

Argued before Smythe, Chief Justice, Robb, Justice, and Judge Martin of the United States Court of Appeals.

This is a special appeal from an order of the Supreme Court of the District of Columbia, quashing the service of summons in the case.

The action was begun by the Whalen Pulp & Paper Mills, Ltd., against James C. Davis, Director General of Railroads and Agent of the President. The plaintiff averred that it had shipped certain consignment of crude sulphur from Bryanmound, Texas to Prince Rupert, Canada, over the Houston & Brazos Valley Railroad and other systems of transportation, then under Federal Control, and that an excessive rate of freight had been exacted thereon, for which overcharge plaintiff prayed judgment.

A writ of summons was issued to the marshal, who made a return of personal service upon the defendant.

The defendant thereupon filed a motion to quash the service aforesaid, claiming that a contract had been made under the statute with the Houston & Brazos Valley Railroad, for the conduct by it of litigation arising out of its operation during Federal Control, and accordingly that no valid service of process could be made upón the defendant herein except only by service upon an agent or officer of the said railroad, authorized by law to be served with process in action brought against it. The motion was sustained by the Trial Court and the service was quashed. This appeal is brought to challenge that ruling.

The issue thus presented is governed by paragraphs (a) and (b) of Section 206, Transportation Act, 1920, 41 U. S. Stat. 461.

The first of these paragraphs provides that certain classes of actions, like this one, arising out of the operation of railroads while under Federal Control, may, after the termination thereof, be brought against an agent to be designated by the President for that purpose; and that such actions may be brought in any court which but for Federal Control would have had jurisdiction of the action had it arisen against the carrier.

The defendant is a duly appointed and acting statutory agent thus provided for and no objection is made by him upon that point. The second paragraph relates to the method of serving process upon the defendant in such cases and reads as follows:

> "Process may be served upon any agent or officer of the carrier operating such railroad or system of transportation, if such agent or officer is authorized by law to be served with process in proceedings brought against such carrier and if a contract has been made with such carrier by or through the President for the conduct of litiga-

tion arising out of operation during Federal Control. If no such contract has been made process may be served upon such agents or officers as may be designated by or through the President. The agent designated by the President under subdivision (a) shall cause to be filed, upon the termination of Federal Control, in the office of the Clerk of each District Court of the United States, a statement naming all carriers with whom he has contracted for the conduct of litigation arising out of operation during Federal Control, and a like statement designating the agents or officers upon whom process may be served in actions, suits, and proceedings arising in respect to railroads or systems of transportation with the owner of which no such contract has been made; and such statements shall be supplemented from time to time, if additional contracts are made or other agents or officers appointed."

It may be said in brief that paragraph (a) provides for the bringing of actions like this after the termination of Federal control, and prescribes the venue thereof; while paragraph (b) specifies the manner in which service of process may be made upon the defendant in such cases. For the latter purpose, the carriers are divided into two classes, first those with whom contracts have been made for the conduct by them of litigation arising out of Federal operation and second, those with whom no such contracts have been made. In cases involving the first class process may be served upon the defendant by means of service upon the officers of the carriers; in cases involving the second class service may be made upon the defendant by means of service upon agents to be designated by the defendant for that purpose. The section contained no reference whatever to the service of process upon the defendant by means of personal service upon him, in either class of cases.

This case comes within the first class, since a contract was made with the carrier for the conduct of litigation by it as aforesaid, nevertheless summons was not served upon the defendant by means of service upon the officers of the carrier, as prescribed by the paragraph, but by means of service upon the defendant personally. In support of that procedure it is contended by the plaintiff, that the use of the word "may" in paragraph (b) indicates that its provisions are intended to be permissive only and accordingly that it is optional with a suitor whether process shall be served as prescribed by the paragraph, or by means of service upon the defendant personally. The defendant, upon the other hand, claims that the prescribed methods of service are exclusive and mandatory.

It must be admitted that ordinarily the word "may" imports permission only but that at times it is employed in legislation as equivalent to the word "shall". The term has been the subject of innumerable judicial interpretations. These, however, will not now be discussed, nor even cited, since we think that the text and manifest purposes of the present enactment claim plainly indicate that in this instance the word is used in a mandatory sense.

While the carriers were under Federal control the venue of actions like these was governed by general orders 18, 18-a, 26 and 50, promulgated by the Director General of Railroads. The Courts take judicial notice of such orders. *Haas* v. *Henkel*, 216 U. S. 452, the orders directing that all such actions against the Director General of Railroads must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose, and that process may be served therein upon the operating officials, operating the carrier for the Director General of Railroads.

Orders expressly declared it to be necessary in the public interest that the venue in such cases should be thus restricted. The provision for venue, therefore, was expressly mandatory, and the cognate provision for process was impliedly so although the word "may" was employed as in this instance in respect thereto. Both provisions were clearly intended to be regulatory in character, and the given procedure was not left to the election of the suitor.

When the Federal control of carriers was terminated by the Transportation Act, 1920, Congress provided by Section 206 for the survival against the Government of causes of action based upon the Federal operation of the carriers, and again prescribed the venue and the method of serving process therein. The latter provisions, like their predecessors, were designated as authoritative provisions for the regulation of such litigation, and like them were mandatory in character. Accordingly the mode of service attempted in this case was unauthorized and was rightly set aside.

These conclusions, furthermore are consistent with the fair import of the language of paragraph (b), for where permission is granted under certain expressed conditions to serve process in a given manner, it is thereby employed that the authority cannot be exercised under opposite conditions.

In the present instance that interpretation is sustained, and indeed required, by the fact that paragraph (b) while provided with rate particularity for the service of process upon the defendant by means of service upon his legal representatives, makes no difference whatever to the service of process upon him personally.

It will be understood, of course, that the foregoing reasons all rest finally upon the conceded rule that when the United States consents to be sued, the method of procedure prescribed by Congress as part of the consent

must be strictly followed, in order to secure jurisdiction for in such cases the remedy of the suitor depends wholly upon the Government's consent and it cannot be enlarged beyond the clear terms thereof. This rule applies also "where a particular method of serving process is pointed out by the statute." *Amy* v. *Watertown*, 130 United States, 301, 317; *Schillinger* v. *United States*, 155 U. S. 163, 166; *MacElrath* v. *United States*, 102 U. S. 426, 440; *Price* v. *United States*, 174 U. S. 373, 375.

The decision is affirmed, with costs.

By JUDGE MARTIN.

262-274

Office Supreme Court, U. S.
FILED
APR 12 1923
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM 1922.

No. 27 Original.

IN THE MATTER

of

The Petition of JAMES C. DAVIS, as Director General of Railroads, as agent, for a writ of prohibition and/or mandamus, against the HONORABLE LEARNED HAND, a Judge of the District Court of the United States for the Southern District of New York, and the other Judges and officers of said court.

RETURN.

Supreme Court of the United States

IN THE MATTER OF The Petition of JAMES C. DAVIS, as Director General of Railroads, as agent, for writ of prohibition and/or mandamus, against the HONORABLE LEARNED HAND, a Judge of the District Court of the United States for the Southern District of New York, and the other Judges and officers of said Court.	October Term, 1922. No. 27 Original.

I, Learned Hand, one of the Judges of the District Court of the United States for the Southern District of New York, in obedience to a rule to show cause herein issued out of this court on March 12, 1922, on a petition attached thereto directing me and the other Judges and officers of said court to show cause why a writ of prohibition and/or mandamus should not issue against me and said other judges and officers of said court, in accordance with the prayer of the petitioner, hereby appears, certifies and makes return as follows:

1. It is true, as alleged in the petition *(11) and as appears by the libel (76) that the New Jersey Shipbuilding & Dredging Company, owner of a drill scow (78) filed a libel in rem in the

* This and like references are to folios in the petition and annexed papers.

said District Court on February 19, 1920 (51), against the steamtug Mahanoy, to recover $60,000 damages, in cost of repairs and loss of use, sustained through the negligence of the tug, set forth in detail (84-88) on November 7, 1919 (81), while navigating in the East River, in bringing the middle tier of her tow of loaded coal barges (83) arranged in tiers on a long hawser, into collision with the drill scow, causing the injuries resulting in the damages before mentioned, the drill scow being a part of a plant which the New Jersey Shipbuilding & Dredging Company was operating in the performance of a contract with the United States of America in excavating a reef in the East River designated as the Clark Street area, located in the river about abreast of Old Slip, Borough of Manhattan, City of New York.

As appears by the records of the said District Court, no process against the said steamtug, as prayed for in said libel (90), was ever issued out of said District Court.

On May 25, 1920 (94), an order was entered upon the consent (99) of Harrington, Bigham & Englar, proctors for the respondent Walker D. Hines, as Director General of Railroads, as agent, substituting him as such, in place of the steamtug Mahanoy, with the same force and effect as if said Director General had been originally made party respondent in the suit (96) and further amending the libel by adding an additional article (97) alleging that the Lehigh Valley Railroad Company and the tug at the time in the libel mentioned "was in the possession, use and operation of the President and the United States Railroad Administration acting through the said re-

spondent, Walker D. Hines, as Director of General of Railroads" and that pursuant to the provisions of Section 206 of the "Transportation Act, 1920," the respondent, Walker D. Hines, as Director General of Railroads, was duly designated by the President of the United States, the agent against whom should be brought proceedings in admiralty based on causes of action arising out of the possession by the President of the railroads and systems of transportation of any carrier under the provisions of the Federal Control Act or the Act of August 29, 1916; and that libellant's cause of action arose out of the possession, use or operation of the Lehigh Valley Railroad Company and of the tug by the President, acting through the Director General of Railroads, and that the suit was brought against the latter in accordance with the provisions of said Transportation Act.

On July 1st, 1920, an answer (100) was filed in the District Court to the amended libel by John Barton Payne, as successor to Walker D. Hines, Director General of Railroads, which was subscribed at the end thereof "Harrington, Bigham & Englar, proctors for the respondent" (120). This answer was verified by the affidavit (121) of T. Catesby Jones, in which it was stated that he was a member of the firm of Harrington, Bigham & Englar, proctors for the respondent; that the reason the verification was made by him and not by the respondent was that respondent was not within the jurisdiction, but that the sources of his (deponent's) information and the grounds of his belief, were statements made by the respondent (122). The answer admitted (104, 105) the allegations of the first and second

paragraphs of the ninth article of the amended libel (97-99) except it denied the allegation in article ninth that the tug was owned by the Lehigh Valley Railroad Company; the answer admitted the admiralty and maritime jurisdiction of the United States and of the said District Court (105) and further affirmatively alleged (118) as a separate defense that the respondent was entitled to limit his liability to the value of the tug and its pending freight and reserved all his rights to set up such limitation by a petition for limitation of liability, pursuant to the United States Revised Statutes and the amendatory and supplemental Acts of Congress, if the respondent should be advised that such a proceeding was necessary.

The answer was endorsed as follows: "United States District Court, Southern District of New York. New Jersey Shipbuilding & Dredging Company, Libellant v. Walker D. Hines, Director General of Railroads, etc., Respondent. Original Answer to Amended Libel. Harrington, Bigham & Englar, proctors for Respondent, 64 Wall Street, New York City. Filed July 1, 1920."

On July 1st, 1920, simultaneously with the filing of the said answer, John Barton Payne, by Harrington, Bigham & Englar, his proctors, filed in the District Court a petition (124-153) under the then 59th (now 56th) Rule in Admiralty, as Director General of Railroads and agent for the Lehigh Valley Transportation Company against himself as Director General of Railroads and agent for the New York, New Haven & Hartford Railroad Company, owner of the steamtug Transfer No. 20, charging that he, petitioner, in the latter capacity, was liable for

the collision and resulting damage (151) due to the fault and neglect of the last mentioned tug, causing the collision (145); that said petition alleged among other things that by Acts of Congress and proclamations of the President of the United States (130) railroads and carriers, including the Lehigh Valley Transportation Company and the New York, New Haven & Hartford Railroad Company, were placed under the direction and control of the Director General of Railroads, who during all the times in said petition mentioned, was in charge of the operation and control of all the property of these two companies, including the steamtug Mahanoy and the steamtug Transfer No. 20, and that thereafter John Barton Payne, was appointed Director General of Railroads as agent for both said companies against whom actions at law might be brought based on causes of action arising out of the operation by the President under the provisions of the Federal Control Act of said railroads or systems of transportation; that it was further alleged (151) in said petition that all and singular the premises therein were true and within the admiralty and maritime jurisdiction of the United States and of the said District Court. The said petition was subscribed at the end thereof "Harrington, Bigham & Englar, proctors for petitioner" (153), and was verified by the affidavit (154) of T. Catesby Jones, in which it was stated that he was a member of the firm of Harrington, Bigham & Englar "proctors for the respondent herein," and was in form and in content the same as his affidavit of verification to the answer as hereinbefore stated.

The petition was endorsed as follows: "United States District Court, Southern District of New York. New Jersey Shipbuilding & Dredging Company, Libellant, v. Walker D. Hines, as Director General of Railroads, and agent, Respondent. Petition. Harrington, Bigham & Englar, proctors for petitioner, 64 Wall Street, New York City. Filed July 1, 1920."

On July 7, 1920, there was filed in the suit in the District Court, a notice of appearance (157) by John Barton Payne, Director General of Railroads as agent for the New York, New Haven & Hartford Railroad Company by Charles M. Sheafe, Jr., his proctor, and at the same time he, as Director General of Railroads, and agent, on account of New Haven Transfer No. 20, filed in the said District Court exceptions to the libel and his own petition (171), praying that the libel and petition be dismissed upon the ground (172) that at the time of the collision on November 7, 1919, both tugs were solely under the control and management of and were being operated solely by Walker D. Hines, Director General of Railroads, and for this reason no cause of action ever accrued to the said Director General of Railroads, operating the tug Mahanoy as against himself, operating the Transfer No. 20, or against John Barton Payne, his successor, and upon the further ground (174) that by the Acts of Congress of August 29, 1916, March 21, 1918, and February 28, 1920, and the proclamations of the President issued thereunder, provision had been made for the payment by the United States of all judgments against the Director General of Railroads, as agent, resulting from causes which arose out of the operation by the President

of the railroads or systems of transportation under the statutes before mentioned, and that any decree for damages to which the original libellant might be entitled, would necessarily be satisfied out of a common fund belonging to the United States, and either derived from the operation of said railroads, including the transportation systems of the Lehigh Valley Transportation Company and the New York, New Haven & Hartford Railroad Company, or out of the revolving fund or funds appropriated by the before mentioned Acts of Congress, and that therefore the petition of said John Barton Payne was unauthorized and unwarranted by law.

On January 11th, 1922, this cause came on to be heard in regular order, together with two other causes for damage growing out of the same collision (24) brought by the W. J. Fee Coal Co. and the James McWilliams Blue Line (178) against the Director General of Railroads, the parties libellant appearing by their respective proctors and Harrington, Bigham & Englar by Henry B. Potter for all respondents (180, 181). The copy of the minutes (178-243) is incomplete as it does not include in the record of proceedings that before any testimony was taken, Charles M. Sheafe, Jr., proctor for respondent, John Barton Payne, as successor to Walker D. Hines, Director General of Railroads and agent, appeared by Edward R. Brumley, proctor, and asked that the exceptions to the libel and petition (169-177) before referred to should be sustained and the libel and petition dismissed, and argument was thereupon made before me by the said Edward R. Brumley on behalf of Charles M. Sheafe, Jr., in

support of the exceptions and by the said Henry B. Potter, proctor, on behalf of Harrington, Bigham & Englar. At the conclusion of such argument, the Court, for reasons which it deemed proper, including those appearing in the record (227-9), and in deference to the decision of the United States Circuit Court of Appeals for the Second Circuit in Globe & Rutgers Fire Ins. Co. v. Hines, 273 Fed. 774, certiorari denied, 238 U. S. 616, 646, sustained the exceptions and dismissed the libel and petition, as more fully appears by the order entered in said District Court on January 11, 1922 (244-249).

Immediately thereafter on said January 11, 1922, the New Jersey Shipbuilding & Dredging Company and the other parties libellant proceeded to adduce their testimony in support of the claims set forth in their respective libels, without objection to the jurisdiction, on the part of the said Director General of Railroads, represented by Harrington, Bigham & Englar, his proctors, through Henry B. Potter aforesaid.

Upon the testimony thus taken, together with the facts alleged in the tenth article of the answer (106, 113) of the Director General of Railroads, to the amended libel of the New Jersey Shipbuilding & Dredging Company (101), the Court concluded and decided that the Director General of Railroads was liable for the injury caused to the drill scow of the New Jersey Shipbuilding & Dredging Company, and the consequent damage (190, 191) and excluded proof offered by counsel for the Director General of Railroads that the collision and damage were not caused by any negligence on the part of the tug Mahanoy, but

were wholly due to the fault and neglect of the tug Transfer No. 20, counsel last mentioned conceding that the Transfer No. 20 was at the time of the collision part of the equipment of the New York, New Haven & Hartford Railroad in the possession and control of the Director General of Railroads (227). The reasons for the decision of the court are set out in the record (227, 229) and were in brief (228) that the only respondent in the case was the Director General, who at the time was in control of both railroads in question and both tugs; that he was operating then a single system of transportation by means of the equipment of both railroads, and that therefore it made no difference whether the negligence which caused the injury was due to the crew of the Mahanoy or the crew of the New Haven boat; in either case, the injury was due to an agent of the Director General who was a single carrier; that the libellant had been injured by one of two sets of servants concededly, and that would be enough to charge the Railroad Administration liability.

This decision that the Director General was liable having been rendered by the court, Mr. Thompson, appearing as special counsel for the Director General of Railroads, then raised an objection to the jurisdiction of the Court to hear and determine the suit, on the ground that there had been no service of process in the suit, upon the Director General as required by Sec. 206, Subd. B of the Transportation Act, 1920 (41 Stat. L. 456), although he had been brought into Court by an appearance of Harrington, Bigham & Englar, his proctors and this appearance it was conceded (237) was authorized if the Director

General might appear voluntarily by any attorney like any other party. The Court after hearing counsel fully on the point (236) overruled the objection for the reasons appearing in the record (237-241) which were in brief that by Sec. 206-b of the Act of Congress last mentioned, it seemed to the Court very obvious that the purpose of Congress (239) was no more than to say that the Director General should be a party defendant by the same procedural method as any other individual becomes such, and that the court was bound (240) to give to the purpose of Congress fair latitude and when a Director General is subjected to service like an individual, it is to be assumed that the ordinary methods of bringing him before the court are available, both as to the parties and to him if he wishes to avoid the purest of formalities, and (239) there certainly could be no conceivable purpose in supposing that the mere delivery of a piece of paper, like a monition, to one of the agents (designated in Sec. 206-b) was within the intent of Congress. The Court overruled the objection to jurisdiction and passed an interlocutory decree in favor of the libellant, New Jersey Shipbuilding & Dredging Company, for its damages sustained by reason of the collision, with an order of reference to a special commissioner to compute such damages, which decree was entered in the said District Court on February 18, 1922 (250).

On February 27, 1922, process (Citation, Petn. 256-261) was issued by the District Court in the suit against the petitioner as agent, the libel having been further amended by substituting him in the place of Walker D. Hines as Director

General of Railroads by an order entered by the District Court on February 20, 1922 (254). The process was served upon the petitioner, as agent, by the Marshal of the District Court on February 27, 1922, as appears by the following return of the Marshal endorsed on the process, viz.: "I hereby certify that on the 27th day of February, 1922, at the City of New York in my district, I served the within citation upon the within named respondent, James C. Davis, Director General of Railroads as Agent, Lehigh Valley Transportation Company, by exhibiting to Mr. German as designated agent of Lehigh Valley Transportation Company at 143 Liberty Street, New York City, the within original and at the same time leaving with him a copy thereof. William C. Hecht, U. S. Marshal, Southern District of New York. Dated, March 7, 1922."

On March 6, 1922, the petitioner, as agent, entered into the District Court notice of appearance in the suit by Bigham, Englar & Jones, (the successors of Harrington, Bigham & Englar), his proctors, (Notice of Appearance Petn. 262), which was endorsed as follows: "United States District Court, Southern District of New York, New Jersey Shipbuilding & Dredging Company, Libellant, against James C. Davis, Agent, Lehigh Valley Transportation Co., Respondent. Notice of Appearance. Bigham, Englar & Jones, Proctors for Respondent, 64 Wall Street, New York City. Filed March 7. 1922."

The transcript of the record, which is annexed to the petition at pages sixteen to eighty-eight inclusive, is a true copy of the pleadings, papers and record of the proceedings before me and are

hereby incorporated in this return, but in addition to such papers, there are other proceedings and papers referred to in this return which are likewise a part of the record.

IN WITNESS WHEREOF, I, LEARNED HAND, one of the Judges of the District Court of the United States for the Southern District of New York, have hereunto set my hand and the seal of said Court, this 11th day of April, 1923.

LEARNED HAND,
Judge of the District Court of the United States for the Southern
(Seal) District of New York.